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The passage by congress of a new national bankruptcy measure, after long and persistent effort by the advocates of legislation in that direction, is of such importance as to demand more than passing mention, and will justify a review of the main features of the bill. The law provides for both voluntary and involuntary bankruptcy. As to the latter the bill defines an act of bankruptcy by a person to consist of his having conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them, or transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors, or suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference, or made a general assignment for the benefit of his creditors, or admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act, but such time shall not expire until four months after the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference or a general assignment for the benefit of his creditors if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment. It is made a complete defense to proceedings in bankruptcy to allege and prove that the party proceeded against was not insolvent at the time of the filing of the petition against him.

Any person who owes debts except a corporation is entitled to the benefits of the measure as a voluntary bankrupt, and any natural person except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company and any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial. A partnership may be adjudged a bankrupt during the continuance of the partnership business or after its dissolution and before the final settlement thereof. The creditors of the partnership are to appoint the trustee, but in other respects so far as possible the estate is to be administered as are others. The trustee is to keep separate accounts of the partnership property and of the property belonging to the individual partners, and the expenses are to be paid from the different kinds of property respectively in such proportions as shall be determined by the court. The act will not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State where they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

It is made the duty of a bankrupt, among other things, to examine the correctness of all proofs of claims filed against his estate, to execute and deliver such papers as may be required by the court, and execute to his trustee transfers of all his property in foreign countries, immediately inform the trustee of any attempt by his creditors or other persons to evade the provisions of the act, disclose the fact that any person has proved a false claim against the estate and prepare to make oath to and file within ten days after adjudication if an involuntary bankrupt, or with the petition if a voluntary bankrupt, a schedule of his property, showing the amount, kind and location thereof, its money value in detail, and a list of his creditors, the amounts due each of them, the consideration therefor, the security held by them, if any, and a claim for such exemptions as he may be entitled to. Finally, the bankrupt is required, at such times as the court shall order, to submit to an examination concerning the conduct of his business, the

cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration of his estate.

Terms of composition may be offered by a bankrupt to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors, and filed in open court the schedule of his property and list of his creditors required to be filed by bankrupts. Compositions may be confirmed where the court is satisfied that they are for the best interests of the creditors; that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are made in good faith, and have not been made or procured except as provided in the act, or by any means, promises or acts therein forbidden. Compositions may be set aside on the ground of fraud.

Applications for discharge may be filed after the expiration of one month and within the next twelve months subsequent to adjudication of bankruptcy, or in case the bankrupt is unavoidably prevented from filing it within that time, then within the next six months. Applications for discharges are to be heard by the court, which will receive such proofs and pleas as may be made in opposition thereto by parties in interest at such time as will give them a reasonable opportunity to be fully heard. Applicants are to be discharged unless they have committed offenses punishable by imprisonment, as provided in the act, or with fraudulent intent to conceal their true financial condition, and in contemplation of bankruptcy destroyed, concealed or failed to keep books of account or records from which their condition might be ascertained. The confirmation of a composition will discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition, and those not affected by a discharge. Discharges may be revoked on the ground of fraud. The liability of persons who are co-debtors with, or guarantors, or in any manner sureties for bankrupts, is not to be altered by the discharge of the latter.

Regarding the operation of the discharge itself, it is provided that it will release a bankrupt from all of his provable debts except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice of actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.

The details of procedure contained in the act are comprehensive and minute, and it will be impracticable to go into them with any particularity here. Taken as a whole they seem to be well framed and open to little criticism, though in the practical working out of the act some difficulties or discrepancies may be disclosed that do not suggest themselves at the first blush. No measure, of course, can be judged save by the test of actual operation. It may, however, be said that the whole subject of the relations of the insolvent to his creditors will be better regulated under a uniform system, even though unexpected flaws should be discovered in it, than under the varying State statutes which have controlled this rather difficult field since the last national bankruptcy law was taken off the statute book.

NOTES OF IMPORTANT DECISIONS.

CARRIERS OF PASSENGERS — INJURY TO PASSENGERS — CONTRIBUTORY NEGLIGENCE.—In Texas & P. Ry. Co. v. Reeder, 18 S. C. Rep. 705, decided by the Supreme Court of the United States, it was held that a shipper of stock in an emigrant car, who rode with it in the car in violation of the terms of his contract, which required him to remain in the caboose while the train was in motion, was not for that reason guilty of negligence preventing his recovery for an injury which resulted from the negligence of defendant's servants in charge of the train while the car was stationary, and while plaintiff was giving proper attention to his stock.

BUILDING AND LOAN ASSOCIATION—RIGHTS OF BORROWING SHAREHOLDER.—In Sullivan v. Stucky, 86 Fed. Rep. 491, decided by the United States Circuit Court, District of Indiana, it was held that where a building and loan association becomes insolvent, and a receiver is appointed to

wind up its affairs, a borrowing shareholder is chargeable with the amount of money actually received by him, with interest from the time it was received, and is entitled to credit for all interest paid, and for so much of the premium as was unearned at the time the society passed into the possession of the receiver. The court says in part: "Three views have been advanced in regard to the relative rights and obligations of the borrowing and non-borrowing shareholders. The first view is that the relation between the society and the borrowing shareholder has been changed by the circumstances to one subsisting between an ordinary creditor and debtor, and that the borrowing shareholder is to be charged with the amount actually received by him, with interest at the legal rate, and credited with all payments made, whether by way of dues, interest or premium, according to the rule governing partial payments. Cook v. Kent, 105 Mass. 246; Association v. Zucker, 48 Md. 448; Association v. Buck, 64 Md. 338, 1 Atl. Rep. 561; Association v. Goodrich, 48 Ga. 445; Brownlie v. Russell, 8 App. Cas. 235. This view throws all the loss on the non-borrowing shareholder, and for that reason it is unjust and inequitable. Both classes of shareholders ought equally and impartially to bear the burden arising from the unexpected misfortunes of the enterprise. This can only be accomplished by requiring the borrowing shareholder to return the amount of the loan received by him, with interest, and then receive his *pro rata* share of the dividend paid upon the stock, equally with the non-borrowing shareholder. The second view is that the borrowing shareholder is entitled to credit upon his loan for the amount of interest and premium paid by him, but is not entitled to have the amount of the dues paid by him on account of stock applied upon his loan. Towle v. Society, 61 Fed. Rep. 446; Stroben v. Association, 115 Pa. St. 273, 8 Atl. Rep. 843; Rogers v. Hargo, 92 Tenn. 35, 20 S. W. Rep. 430; Brown v. Archer, 62 Mo. App. 277; Knutson v. Association, 69 N. W. Rep. 889; People v. Lowe, 117 N. Y. 175, 22 N. E. Rep. 1016; End. Bldg. Assns., §§ 528, 531. The third view differs from the last one, in that, instead of crediting the borrowing shareholder with the whole premium, it credits him with only the part estimated as unearned. Towle v. Society, 61 Fed. Rep. 446. The court is of opinion that the defendants are chargeable with the amount of money actually received by them, with legal interest thereon from the time it was received, and are entitled to credit for all interest paid, and are to be charged with so much of the premium as was earned at the time the society passed into the possession of the receiver, estimating the life of the society at eight years."

MUNICIPAL CORPORATION — HIGHWAYS — RIGHTS AND DUTIES OUTSIDE OF STATE.—In Becker v. City of La Crosse, 75 N. W. Rep. 84, decided by the Supreme Court of Wisconsin, it was held that a city is not liable for a defective highway outside the State, though it constructed it under an act of the other State giving it the right to do so, and declaring it liable for damages from improper construction and repair; its acts in this regard being *ultra vires*. After considering the general doctrine the court says: "In arriving at this conclusion, we have not overlooked the rule laid down in the celebrated case of Bank of Augusta v. Earle, 13 Pet. 519, to the effect that a corporation created by one sovereignty may, by comity, do business, hold property, and sue in the courts of other sovereignties of the Union, nor the line of decisions that hold that a city may take and hold the title to property outside of its corporate limits. In the first instance, the rule must be confined to trading or commercial corporations in contradistinction to municipal corporations; and, in the second line of cases referred to, the decisions are based upon the rule that the right to own property is not a sovereign right, and that the title to property may vest in the municipality even though it may not exercise the rights of sovereignty over it. Lester v. City of Jackson, 69 Miss. 887, 11 South. Rep. 114; *In re* Mayor, etc. of New York, 99 N. Y. 569, 2 N. E. Rep. 642. And see McDonough's Exrs. v. Murdoch, 15 How. 367. We therefore hold that the City of La Crosse was without authority, under its charter or the law of this State, to accept privileges or assume duties and obligations to be performed outside of the limits and beyond the jurisdiction of this State, and, owing no duty to the plaintiff with reference to this highway, cannot be held liable in this action.

"The cases of The Giovanni v. City of Philadelphia, 59 Fed. Rep. 303, and Guthrie v. City of Philadelphia, 73 Fed. Rep. 688, cited to support the plaintiff's recovery, are quite unlike the case at bar. We have no quarrel with the proposition that, when a municipal corporation engages in things not municipal in their nature, it acts as an individual, and is responsible accordingly. In each of these cases the corporation defendant engaged in the performance of duties strictly within its chartered powers, and the recovery against it was based entirely on that ground."

LIEN ON CHATTEL FOR REPAIRS — PRIORITY OVER CHATTEL MORTGAGE.—By operation of the common law in the absence of any specific agreement, every person who has bestowed labor and skill on a chattel bailed to him for the purpose, and has thereby increased its value, has a lien on such chattel, and may retain it until paid his reasonable charges for his services. Such rule of the common law is in force in most of the States, and such lien may, by force of special facts or circumstances override or be superior to prior contractual or statutory liens. Such question was involved in the case of Drummond Carriage Co. v. Mills, 74 N. W. Rep. 966, decided by the Supreme Court of Nebraska. There it appeared that a physician gave a mortgage on a buggy of which he retained possession and used it in his

business. It was of the recitals of the mortgage that he should not so negligently or improperly use or care for the property as to subject it to probable loss or material depreciation in value, and the mortgagee had knowledge that the buggy at times needed repairing, and had seen it at one time left at the shop to be repaired. The mortgagor, without the knowledge of the mortgagee, left the buggy with a carriage company for needed repairs. The company repaired the buggy, and retained possession thereof to enforce a claimed lien for, or the payment of its reasonable charges for, such repairing. The mortgagee instituted an action of replevin against the carriage company to obtain possession of the buggy, asserting right thereto under and by virtue of his mortgage lien. It was held that the mortgage lien was subordinate to the common law lien, since the recitals of the mortgage and the facts and circumstances disclosed that the mortgagor had at least implied authority from the mortgagee to have the repairs made. One of the members of the court dissented.

SURPRISE AS GROUND FOR A NEW TRIAL.

It is provided by statute in most of the States that "accident or surprise which ordinary prudence could not have guarded against" shall be a cause for a new trial. But this provision has been construed with such strictness by the courts that very few new trials are granted for this reason. Many things which occasion surprise do not produce the "legal surprise" which will authorize the granting of a new trial; and the action of the trial court in granting a new trial on an insufficient showing of surprise will be reversed on appeal.[1] The surprise which justifies the granting of a new trial must be due to some occurrence which was not only unforeseen, but which could not reasonably have been foreseen and avoided. A party to a suit is bound to foresee that his opponent will make use of all available proof under the issues joined,[2] and he cannot claim surprise on the ground that the evidence of his adversary's witness did not sustain his own theory of the case,[3] nor because of evidence which tended to sustain an answer filed by the opposite party months before the trial.[4] Where the defendant has pleaded justification to a complaint for slander, the introduction of evidence tending to prove the truth of the words spoken cannot constitute legal surprise.[5] A party cannot complain of competent evidence which he draws from the opposing party's witnesses on cross-examination.[6] It is said that, as a party may usually obtain a continuance,[7] and the plaintiff may, in any event, suffer a non-suit if he finds himself unprepared to meet the defendant's evidence,[8] he may not proceed with the trial and take his chances of a verdict, and, after verdict, claim a new trial on the ground of surprise at evidence which was not followed by a motion for a continuance nor an offer to dismiss.[9] He must give notice of the surprise at the time that relief may be afforded.[10] It would be giving the plaintiff too great an advantage to permit him to take the chance of a verdict, and when it is lost, to relieve him from the verdict and give him an opportunity to present his case to another jury merely because the evidence against his claim was stronger on the first trial than he expected it would be.[11] A party will not be allowed to speculate on his chances for a verdict, and then be afforded relief if he fails,[12] and even where he could not, for any reason, dismiss his suit or suffer a non-suit without prejudice to his case, the plaintiff's failure to ask for a continuance when it is available, will deprive him of the right to afterward claim a new trial on the ground of surprise.[13] Even though the evidence was incompetent, the opposing party cannot obtain a new trial for surprise at its introduction if it was introduced without objection on his part.[14] A party who was misled by statements of his own witnesses before the trial will not be granted a new trial where it does not appear

[1] Cummins v. Walden, 4 Blackf. (Ind.) 307.

[2] Doyle v. Levy, 35 N. Y. Supp. 434, 89 Hun, 350; Gardner v. State, *ex rel.* Stottler, 94 Ind. 489.

[3] Harris v. White, 56 Mo. App. 175.

[4] Wilson v. Waldron, 12 Wash. 149, 40 Pac. Rep. 740.

[5] Doyle v. Levy, 35 N. Y. Supp. 434, 89 Hun, 350.

[6] Chamberlain v. Reid, 49 Ind. 332.

[7] State *ex rel.* Beaver v. Bottorff, 82 Ind. 538; Toledo, P. & W. Ry. Co. v. Endres, 57 Ill. App. 69.

[8] Cummins v. Walden, 4 Blackf. (Ind.) 307; Helm v. First National Bank, 91 Ind. 44; Flint & P. M. R. Co. v. Marine Ins. Co. (C. C.), 71 Fed. Rep. 210.

[9] Riley v. Shannon (R. I.), 34 Atl. Rep. 989; Shipp v. Suggett, 9 B. Mon. (Ky.) 5.

[10] Hurlburt v. Parker, 43 Hun (N. Y.), 634; Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 South. Rep. 175.

[11] Cummins v. Walden, 4 Blackf. (Ind.) 307.

[12] Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 18 South. Rep. 175.

[13] Helm v. First National Bank, 91 Ind. 44; State *ex rel.* Beaver v. Bottorff, 82 Ind. 538; Toledo, P. & W. Ry. Co. v. Endres, 57 Ill. App. 69.

[14] Helm v. First National Bank, 91 Ind. 44.

that the result would have been influenced by the witness swearing as he had represented he would,[15] nor where the facts sought to be proven by such witness were within the knowledge of the party calling him, or of some other competent witness who was present at the trial, but was not examined.[16] Nor will a new trial be granted because of the refusal of a witness to give evidence on the ground that it would tend to criminate him, where that witness is the only one by whom the facts could be proven on the second trial, although he has promised that he will not again take advantage of his privilege.[17] If the evidence by which the testimony that caused the surprise is to be met is merely cumulative, a new trial will not be granted.[18] The fact or facts from which the surprise resulted must have had a material bearing upon the case, and it must appear that the verdict is to be attributed mainly to their effect.[19] It must be shown by affidavit that a different showing will be made if the case is tried again, or a new trial will not be granted however clear a case of surprise is made out.[20] A party may not, as a rule, claim a new trial, if his own negligence or inattention, or that of his attorney, contributed to the surprise.[21] Unless it appears that he was diligent in preparing for trial, an application for a new trial because of surprise will be denied.[22] He must use diligence to learn who can give evidence in his case,[23] and the facts constituting such diligence must be stated in the affidavits.[24] He will in no case be granted a new trial because of the testimony of a witness whom he has called, if he has not used diligence to learn beforehand what the witness will swear to.[25] In the case cited the court said: "This proceeding was commenced on the 4th of February, and was not tried until the 8th of March following, thus giving the appellant over a month to look after testimony. * * * It requires no argument to show that the appellant could have guarded against being surprised by the testimony of the witness by calling on him during the month before the trial, and learning what his testimony would be touching the fact of the making of the affidavit."[26] A party may not obtain a new trial for surprise where he relied upon a witness testifying as he had formerly done in another case if it does not appear that he had conversed with the witness, nor taken any steps to ascertain what his evidence would be, and it is not shown that the witness would testify differently if another trial should be had.[27] If, by a direct inquiry of the witness, he could have ascertained what his testimony would be, he cannot claim legal surprise at what he may swear to.[28] The fact that a witness testified to facts on appeal which he had not mentioned in his evidence at a former trial before a justice of the peace is not ground for claiming legal surprise, where the witness was not questioned as to why he did not give the evidence before the justice, and no excuse is offered for not contradicting his evidence at the trial.[29] In a bastardy case the defendant must examine the relatrix at the hearing before the justice as to her probable testimony at the trial, in the circuit court, or he cannot claim to be surprised because he does not know what it is to be.[30] Where a party takes the deposition of a witness it is his own fault if he does not examine fully as to the witness' knowledge of all features of the case, and learn what evidence he will give if placed on the witness stand.[31] The fact that the plaintiff and his attorney both supposed the written lease upon which his action was based to be for a shorter term than it really was, is not surprise "which ordinary prudence could not have guarded against."[32]

The neglect of an attorney to attend to his

[15] Pittsburgh, etc. Ry. Co. v. Sponier, 85 Ind. 165.
[16] Adamant Mfg. Co. v. Pete, 61 Minn. 464, 63 N. W. Rep. 1027.
[17] Lister v. Boker, 6 Blackf. (Ind.) 439.
[18] State v. Wightman, 27 Mo. 121.
[19] Schellhous v. Ball, 29 Cal. 605.
[20] Haber v. Lane, 45 Miss. 608; Cox v. Hutchings, 21 Ind. 219; Hazen v. State, 58 Ind. 197; McClusky v. Gerhauser, 2 Nev. 47; Denver C. E. Co. v. Simpson, 21 Colo. 371, 41 Pac. Rep. 499; Gidlonsen v. Union Depot Ry. Co., 129 Mo. 392, 31 S. W. Rep. 800; Sheppard v. Avery (Tex. Civ. App.), 32 S. W. Rep. 791.
[21] Dorr v. Watson, 28 Miss. 383; Carroll v. McCullough, 63 N. H. 95.
[22] Solomon v. Norton (Ariz.), 11 Pac. Rep. 108.
[23] Lockwood v. Rose, 125 Ind. 589.
[24] Gardner v. State, *ex rel.* Stottler, 94 Ind. 489.
[25] Taylor Water Co. v. Dillard, 9 Tex. Civ. App. 667, 29 S. W. Rep. 662; *Ex parte* Walls, 64 Ind. 461.
[26] *Ex parte* Walls, 64 Ind. 461.
[27] Stanley v. Sutherland, 54 Ind. 339.
[28] Taylor Water Co. v. Dillard, 9 Tex. Civ. App. 667, 29 S. W. Rep. 662.
[29] Underwood v. Ainsworth, 72 Miss. 328, 18 South. Rep. 379.
[30] Gardner v. State, *ex rel.* Stottler, 94 Ind. 489.
[31] Lockwood v. Rose, 125 Ind. 589.
[32] Borderre v. Den, 106 Cal. 594, 39 Pac. Rep. 946.

duty,[33] or the fact that the trial resulted differently from what was expected by one of the parties,[34] or that the court ruled differently on points of law from what a party thought he would,[35] does not constitute legal surprise. The fact that a party was misled by erroneous advice of his counsel as to the admissibility of evidence,[36] or the burden of proof[37] does not show such surprise as to constitute ground for a new trial. Indeed, it may be laid down as a general rule that surprise arising from the erroneous advice of counsel as to the law governing his case will not entitle him to a new trial.[38] But where the party has a meritorious defense, and manifest injustice would result from a refusal to grant a new trial, it may be granted, although the surprise was partly due to negligence or want of skill.[39] Where the surprise was due solely to negligence on the part of the attorney, he was compelled to pay the costs before a new trial was granted.[40] The fact that, when testifying in his own behalf, a party became so nervous, excited and embarrassed that he forgot many important facts and answered in such a manner as to prejudice his case, does not entitle him to a new trial.[41] The motion for a new trial must set out the particular facts by which the party was surprised,[42] and must be supported by affidavits showing the existence of such facts. If a party claims to have been misled by statements of the opposite party, he must set out at length in his affidavit the statements which he claims were misleading.[43] Counter affidavits may be filed in opposition to the motion,[44] and when this is done an issue of fact is presented upon which the finding of the trial court is final.[45] Where a motion for a new trial was overruled, and the evidence is not in the record, it will be presumed that the court ruled correctly.[46] The granting or refusing of a new trial on account of surprise rests largely in the discretion of the trial court, and its action will not be reversed, unless there has been a manifest abuse of discretion.[47] On the other hand, a new trial has been granted by the supreme court where it appeared by affidavit that the cause was tried by the court over the objection of the defendant's attorney in the absence of the defendant, who had failed to attend because of a statement by the court the week before, on the calling of the docket for trials, that if cases were then passed without being tried, they would be continued until the next term, as the court would only continue in session two days for the purpose of disposing of unfinished business, and would then adjourn.[48] And where the court took a motion to dismiss under advisement until near the close of the term, when, out of court, the judge constituting the court told the defendants and their attorney that they might go home, as he had made up his mind to sustain their motion and dismiss the cause, but afterwards, on resuming his official sitting, overruled the motion, tried the cause in the absence of the defendants, and rendered judgment against them, they were held entitled to a new trial.[49] The courts are usually prompt to relieve against mistakes induced by their own actions or the statements of a judge.[50] Where evidence which had been admitted on a former trial was rejected, and the party was denied the opportunity to produce other evidence of a material fact, a new trial was granted,[51] as also where the case seemed to have been but partially got before the jury.[52] When a party to a suit, with a view to influence his action, tells his adversary that certain matters which appear by the pleadings to be in issue, will not be controverted on the trial,[53] or when, by his actions, he induces his adversary to be-

[33] Bell v. Tanguy, 46 Ind. 49.
[34] Lane v. Brown, 22 Ind. 239.
[35] Perkins v. Brainard Quarry Co., 32 N. Y. Supp. 230, 11 Misc. Rep. 328.
[36] Santa Cruz R. P. Co. v. Bowie, 104 Cal. 286, 37 Pac. Rep. 934.
[37] Root v. Catskill Mt. Ry. Co., 33 Fed. Rep. 858.
[38] Beals v. Beals, 27 Ind. 77; Russell v. Nelson, 32 Iowa, 215; Phillips v. Wheeler, 10 Tex. 536; Ferguson v. Gilbert, 16 Ohio St. 88.
[39] Chinn v. Taylor, 64 Tex. 385; Buford v. Bostick, 50 Tex. 371; Martyn v. Podger, 5 Burr. (Eng.) 2631.
[40] De Roufigny v. Peale, 3 Taunt. (Eng.) 484.
[41] Korte v. Hoffman, 97 Mo. 284.
[42] Brooks v. Douglass, 32 Cal. 208; Theobald v. Hare, 8 B. Mon. (Ky.) 43; Ballard v. Noaks, 2 Ark. 45.
[43] Sullivan v. O'Conner, 77 Ind. 149.
[44] Bingham v. Walk, 128 Ind. 164.
[45] Mitchell v. Chambers, 55 Ind. 289.
[46] Talcott v. Jackson, 41 Ind. 201.
[47] Nooney v. Mahoney, 30 Cal. 226; Dougherty v. Winter, 57 Ill. App. 128; Coker v. State, 20 Ark. 53.
[48] Edsall v. Ayres, 15 Ind. 286.
[49] Ely v. Hawkins, 15 Ind. 230.
[50] Parks v. Nichols, 20 Ill. App. 143.
[51] Helm v. Jones, 9 Dana (Ky.), 26.
[52] Deyo v. Reynolds, 15 Ind. 233.
[53] Symons v. Bunnell, 80 Cal. 330; Haynes v. State *ex rel.* Swope, 45 Ind. 424. But see Smith, etc. Implement Co. v. Wheeler, 27 Mo. App. 16.

lieve that he waives defects in a deposition which is necessary to make out the adversary's case,[54] he must act as he has induced the belief that he will act, or his opponent may claim a new trial on the grounds of surprise; particularly when the trial court refuses an application for a continuance made when the necessity for additional evidence becomes apparent. And where judgment was taken against a party in violation of a stipulation that the case should be postponed, he was held entitled to a new trial.[55] But if the party was present and had an opportunity to make it, an application for a continuance must have been made when the case was called for trial in violation of the stipulation.[56] Where there is a trick, or where the witness has been tampered with by the opposite party, so that he is influenced to swear falsely,[57] or where the party has been misled by a witness, who has made a material mistake in his evidence against the party by whom he was called, or who has intentionally stated the facts to the party differently from what he swears at the trial, a new trial should be granted.[58] And where the adverse party deprived his opponent of material testimony by hiring a witness to absent himself so that he could not be summoned,[59] or a witness clearly made a mistake in his testimony by which the verdict was probably affected, a new trial should be granted.[60] Where a person was placed on trial immediately after he was indicted for killing a man in an encounter two weeks before, to which there were no witnesses, but in which he claimed to have acted in self-defense, and the State called a witness who testified to a threat made by the defendant eighteen months before, that if the deceased "ever crossed his path or insulted him he would kill him," the supreme court reversed the judgment because the trial court had overruled a motion for a new trial on the ground that the defendant was surprised at this testimony, and could prove it to be false.[61] And where the defendant, in a murder case, went into trial relying upon the statement of a witness that he had seen the deceased pursuing the defendant with a large knife immediately after the first of five shots was fired by the defendant, and that the pursuit was kept up until the pursuer dropped dead, which statement the witness refused to make on the stand, and the affidavits, in support of the motion for a new trial, stated that it could be shown by two other witnesses, who were outside of the State at the time of the first trial, that the facts were as he had expected to prove them by the witness who was called, a new trial was granted on appeal.[62] The introduction in evidence of an unrecorded deed, of which the opposite party had no knowledge,[63] the use as evidence of a certified copy of a record, which was erroneous,[64] and the unexpected production at the trial of a written instrument, believed by the other party to be lost, which showed upon its face erasures which might have been satisfactorily explained,[65] have each been held to entitle the losing party to a new trial. And where the defendant, in an action by a corporation to declare a lease forfeited for breach of its conditions by subletting, relied solely upon the legal notice to the plaintiff arising from recording the sublease in the trial before the justice, but at the trial, on appeal, testified that plaintiff's president, who was out of the State at the time of such trial, had actual notice of the sublease, and consented thereto, and an application for a continuance until the president's return was denied, the plaintiff was held entitled to a new trial upon a motion, supported by the affidavit of the president, that the defendant's evidence as to notice to him and consent on his part was untrue.[66]

In conclusion, the rule to be gathered from the authorities is that a new trial will be granted because of surprise only when it is shown by affidavits and by the record that proper notice of the surprise was given at the earliest opportunity, and a proper request

[54] McGinnis v. Gabe, 78 Ind. 457.

[55] Chicago, etc. Ry. Co. v. Gillett, 38 Iowa, 434; Mordhorst v. Reynolds, 23 Neb. 485.

[56] Couillard v. Seaver, 64 N. H. 614.

[57] Greater v. Fowler, 7 Blackf. (Ind.) 554; Hewlett v. Cruchley, 5 Taunt. (Eng.) 277.

[58] Todd v. State, 25 Ind. 212; C. Gotzian & Co. v. McCollum (S. Dak.), 65 N. W. Rep. 1068.

[59] Carey v. King, 5 Ga. 75; Crafts v. Union Mut. F. Ins. Co., 36 N. H. 44.

[60] Scofield Rolling Mills v. State, 54 Ga. 635; Spillars v. Curry, 10 Tex. 143; Coddington v. Hunt, 6 Hill (N. Y.), 595.

[61] Rosencrantz v. State, 6 Ind. 407.

[62] Todd v. State, 25 Ind. 212.

[63] Delmos v. Martin, 39 Cal. 555.

[64] Farnham v. Jones, 32 Minn. 7.

[65] Russell v. Reed, 32 Minn. 45.

[66] Louisville & N. Ry. Co. v. Bickel (Ky.), 30 S. W. Rep. 600.

made for an opportunity to remedy it, that the surprise was not due to negligence or inattention of the applicant, and that he has a meritorious cause of action or defense, and such means of establishing it that a different result would probably be reached if another trial were granted. LOUIS B. EWBANK.

Indianapolis, Ind.

NOVATION.

J. B. WHEELER BANKING CO. OF ASPEN v. HOLDEN.

Court of Appeals of Colorado, April 11, 1898.

nat.

There is a novation releasing H, a corporation, and consequently its directors, from liability for a debt to W, where A, a new corporation, to which the property of H was conveyed by the purchaser at mortgage sale, and to which H released its right of redemption, merely agreed, pursuant to agreement of its organizers, who were the mortgagees, and G, an unsecured creditor of H, to pay the profits to the mortgagees and G in proportion to their claims; A having assumed no debts, but merely agreed to distribute any profits, and G, who obtained from H the release of right to redeem, in consideration of his promise that H should be released from liability on its debts, having had no power to bind other creditors.

THOMPSON, P. J.: Benjamin Ferris, as assignee for the benefit of its creditors of the J. B. Wheeler Banking Company of Aspen, brought this action against Edward R. Holden and Richard Cline, as directors of the Holden Smelting & Milling Company, a corporation, to recover from them an indebtedness due to the banking company from the milling company; the ground of the defendants' liability being, as alleged, the failure of the milling company to comply with the requirements of section 252 of the General Statutes, which provides that, where the president and directors of a corporation have not made and recorded in the office of the secretary of the State, and in the office of the recorder of deeds of the county in which the business of the corporation is carried on, a certificate showing that its capital stock has been fully paid in, unless the corporation shall, annually, within 60 days from the 1st day of January, make and file with the recorder of deeds a report showing the amount of its capital stock, the proportion actually paid in, and the amount of existing debts, its directors shall be jointly and severally liable for all its debts contracted during the year next preceding the time when the report should have been made, and until it shall be made. The answer admitted the failure of the milling company to make and file the report, but set up some matters which were intended to be in avoidance of the effect of the default. These, however, need not be noticed, because they cut no figure at the trial, and all claim on account of them is abandoned here. The answer also admitted the existence of the indebtedness against the milling company at the time of the commencement of the action, but alleged a subsequent contract of novation, whereby it was discharged from liability, and a corporation called the Aspen Union Smelting Company substituted as the banking company's debtor.

Before the trial the assignee made final settlement of the trust estate, and was discharged, and the banking company, having resumed business, was, on motion, substituted as plaintiff. The trial court found a novation as alleged, and rendered final judgment against the plaintiff, from which it prosecutes this appeal.

The only question presented to this court, and the only question which remains in the case, is whether the liability of the milling company was transferred to the smelting company in such manner that, as against the former, the indebtedness was canceled, and the latter became the sole debtor. The facts are not in dispute, and, in order to an understanding of the positions which counsel of the respective parties have assumed in respect to them, it is necessary to give them somewhat in detail.

The Holden Smelting & Milling Company constructed, and for some time operated, works at Aspen for the treatment of ores. While constructing and operating its works, this company contracted indebtedness to R. W. Woodbury in the sum of $46,698.92, to the Union National Bank of Denver in the sum of $41,955.53, to the State Bank of Denver in the sum of $31,120, and to the plaintiff in the sum of $13,606.05. Charles H. Graham, of Philadelphia, had loaned to the defendant Holden $100,000. Holden was a director in the milling company, and also its president. He held all of its stock but a few shares, and this he pledged to secure the loan. He held the notes of the company in sums aggregating about $200,000, for advancements which he had made on its accounts; and, being pressed by Graham for payment, Holden transferred these notes to him as additional security. The other creditors, including the appellant, were pushing the company on their claims, and to secure them, and for their benefit, it executed a mortgage of all its property at Aspen to a trustee. Mr. Graham brought suit by attachment upon the notes which had been transferred to him, and the mortgagees commenced proceedings for the foreclosure of their mortgage. The mortgage and the attachment covered the same property. A litigation ensued between Mr. Graham and the mortgagees, each party claiming priority of lien; to determine who was entitled to satisfaction first out of the property. Priority was adjudged to the mortgagees, and a decree of foreclosure entered in their favor. Mr. Graham took steps to make and perfect an appeal. On the 16th day of April, 1895, the property was sold pursuant to the decree, Mr. Woodbury being the purchaser for himself and the other mortgagees. On that day Mr. Graham and the mortgage creditors entered into a contract which

provided that, for the purpose of settling their dispute amicably, a new corporation should be formed, to which, upon its organization, Mr. Woodbury should convey the property he had purchased, and to which Mr. Graham should cause to be conveyed all the right, title, and interest in the property of the Holden Smelting & Milling Company, and that the capital stock of the company should be divided among the parties to the contract in proportion to the amounts due them, respectively. The contract further provided that, after the organization of the company, it should make an agreement with the parties to the contract that it would divide its first profits among the parties, except Graham, in proportion to their respective claims, until their claims, without interest, should be paid in full; that then the profits should go to Graham until his claim should be paid in full; but that if the mortgage creditors should not be paid in full on January 1, 1899, thereafter the profits should be shared by all the parties to the contract; and that, when they had received full payment, the profits should belong to the stockholders according to their holdings. The proposed new corporation was accordingly organized as the Aspen Union Smelting Company the conveyances provided for were made, and on the 25th day of April, 1895, the corporation entered into the agreement with the parties to the contract for which that contract made provision.

Mr. Holden testified that, shortly before the incorporation of the Aspen Union Smelting Company, Mr. Graham approached him, and stated that the latter company was about to be formed, and would assume all the debts of the Holden Smelting & Milling Company, and submitted a proposition to him, as president of the milling company, that it waive its rights of redemption by executing a deed of the property to the smelting company in consideration of its release from its indebtedness; that Mr. Graham exhibited to the witness a copy of the contract of April 24th, but that the contract of April 16th was not seen by him; that the witness finally agreed with Mr. Graham that the smelting company should assume all the debts of the milling company, and that the latter company should be released and discharged from liability on their account, and should execute the deed required, and that the deed was executed in pursuance of this agreement. The sum which was bid for the property was apportioned among the mortgagees, and the share allowed to the J. B. Wheeler Banking Company was sufficient to reduce its claim, which originally was $13,606.05, to $8,211.19.

It is earnestly and ably argued that the facts in evidence establish the assumption by the smelting company of the debt of the milling company, and the extinguishment of the latter company's liability. Of course, if such was the case, the discharge of the milling company's obligation carried with it the resulting liability of the directors. Counsel find the assumption of the debt in the contract of April 24th, and the release of the milling company in the agreement between Mr. Holden and Mr. Graham. We shall therefore examine the contract and the agreement, and throw upon them the light of the attendant circumstances, to see whether they justify the conclusions which counsel have reached.

1. The contract of April 24th was executed in pursuance of the provisions of the contract of April 16th. The latter was an agreement preliminary to the taking of certain steps which were necessary to the consummation of the final contract. It specified the terms of the final contract, in which, when executed, its provisions were followed and carried out. Accordingly the Aspen Union Smelting Company bound itself to take charge of the works and operate them, and out of the first net profits, as profits should be realized, to pay the mortgage creditors their claims without interest, and afterwards, out of the net profits, to pay the claim of Mr. Graham; but if the profits realized before January 1, 1899, should be insufficient to pay the claims of the mortgage creditors, after that date they should be divided among all the creditors, Graham included, in proportion to the amounts unpaid; and upon payment of all the claims, without interest, the profits should go to the stockholders according to their holdings. The Aspen Union Smelting Company had been organized pursuant to the first agreement, and the title acquired by the mortgagees had been vested in it. Its relation to its grantors was one of trust. It undertook to manage the property and divide the profits among the beneficiaries. It did not agree to pay the claims against the Holden Company. Its only agreement was to distribute profits, and the claims were referred to only as bases on which the amounts to which the creditors might become severally entitled should be estimated. It did not agree to pay anything, to any person, for any purpose, except conditionally, and the condition was that there should be profits out of which payment could be made. It did not become a debtor. So far as the obligation which it assumed is concerned, there is nothing to be found in the contract except an agreement to administer the trust which had been created, and account to the proper parties for all moneys realized from the property with which it was intrusted. We say without hesitancy that by the terms of that contract the Aspen Union Smelting Company did not assume the debt of the Holden Smelting & Milling Company to the J. B. Wheeler Banking Company.

2. The effect upon the banking company of the agreement between Mr. Graham and Mr. Holden is dependent entirely on the authority of Graham to speak for the company. If such authority existed, it devolved on the defendants to show it. Counsel say that Mr. Graham visited the management of the Holden Smelting & Milling Company in behalf of its creditors, but they do not point us to the evidence on which they rely to justify the statement. If Graham had any authority to act for the creditors, it must be deducible from the

two contracts to which he was a party, or from one or the other of them. There is nowhere else to look for it. If it cannot be found there, it is not in the record. The purpose of the first contract was an adjustment of the conflicting claims to priority of the mortgagees on the one hand and Mr. Graham on the other. As a settlement of conflicting interests was involved, the parties dealt at arms' length. Not only was the termination of litigation desirable, but for the purpose of obtaining immediate possession of the property, the extinguishment of the milling company's right of redemption was necessary. The contract carefully specified what each party was to perform. Their mutual covenants were considerations for each other. A corporation was to be formed to take the title. The mortgagees were to cause to be conveyed to the corporation the interest they had acquired under their mortgage. This was the consideration moving from them. Mr. Graham was to cause the interest of the milling company to be transferred to the new company. This was the consideration moving from him. In procuring the conveyance from the milling company, Graham was not acting for the mortgagees, or for the new company, but for himself, and for the sole purpose of carrying out his personal agreement, and entitling him to the benefit of the contract. He therefore did not deal with Holden in a representative capacity at all. The representations and promises which he made to Holden were his own, and bound nobody but himself. He could not release the milling company from its indebtedness to the banking company; and if, in consideration of his assumption to do so, the milling company parted with its interest, it must look to him for indemnity. To say very much in this connection about the second contract is needless. It contained what the first contract provided it should contain. Preliminary to this, it recited the procurement by Graham of a conveyance by the milling company of its equity of redemption to the smelting company, thus acknowledging the performance by him of his prior agreement, and corroborating the relation in which that agreement placed him to his co-contractors.

In view of what has been said, we think extended discussion of the law of novation unnecessary. The facts are not complicated, and the principles which apply to them are on the surface. The Aspen Union Smelting Company assumed no indebtedness and did not become a debtor. No cause of action against it ever accrued to the banking company on account of the debt owing by the milling company. Unless the claim of the banking company against the milling company was released by the authority of the banking company, it was not released, and remains a valid and enforceable claim. But the claim was not released by the authority of the banking company; consequently it was not released, and is valid and enforceable. The smelting company was not charged, and the milling company was not discharged; therefore there was no novation. No question is made upon the liability of these defendants in case the liability of the milling company is unextinguished; and we assume that, on the hypothesis of the validity of the claim against that company, the plaintiff's right to a recovery in this action is conceded. The judgment will be reversed. Reversed.

NOTE.—*Recent Cases on What Constitutes a Novation.*—Defendant, holding a mortgage upon a stock of goods of his brother, who was also indebted to plaintiff, took possession of it, pursuant to a family arrangement that he should close out the stock, and pay plaintiff's debt and that his brother should go home, and care for their father. Plaintiff threatening to attach, defendant promised to pay the debt, whereupon plaintiff desisted, released the original debtor, and looked to defendant for payment. Held, that there was a novation or substitution of debtors. Grieb v. Comstock (Mich.), 58 N. W. Rep. 497. A contract recited that B, one of the parties thereto, had discounted a draft drawn on M, which was afterwards protested for non-payment, and that he had been paid a part of said draft; that he recognized R, the other party to the contract, as M's assignee in the transaction out of which the draft arose; and B bound himself to transfer to R certain stock deposited by M as collateral security for the draft, as soon as the balance due him on the draft had been satisfied by R, either directly or by a sale of the collateral to be ordered by him. Held, that this contract bound R to pay such balance. Runkle v. Burnham, 153 U. S. 216, 14 S. C. Rep. 837. Evidence that a third person agreed to pay plaintiff a part of the sum sued for was properly excluded, since defendant could not be relieved from his written obligation by such person's agreement to pay it, unless plaintiff released him. Ferguson v. McBean (Cal.), 35 Pac. Rep. 559. A contract between two parties, whereby one agreed, upon a consideration moving from the other, to pay a debt due from the latter to a third person, does not constitute a novation, on the mere consent to or adoption of such agreement, by the third person. Barnes v. Hekla Fire Ins. Co. (Minn.), 57 N. W. Rep. 314. After testator had made a will in favor of his daughter, he revoked it, and gave the property to his son, on an agreement between him and the son that the latter should pay the daughter a certain sum. Held, that there was no novation, since the daughter had no claim against her father's estate which she could enforce, and it did not appear that she was ever consulted when he revoked the will. Linneman v. Moross' Estate (Mich.), 57 N. W. Rep. 103. A lumber firm agreed with two of its members to sell them sawed lumber at a certain price. The two members formed a new firm, and one of them sold his interest in the contract to the other, and the latter sold interests therein to two strangers. The old firm continued to sell to the purchasing concern under the agreement, and to receive payment therefrom, without regard to its *personnel*, the bills being in all instances made out in the name of the purchasing concern. There was no evidence of any agreement to release the original contractors. Held, that there was no novation, and the lumber firm could sue one of the purchasing members for an accounting without joining his new associates in the purchasing contract. Chapin v. Brown (Cal.), 34 Pac. Rep. 525. A purchaser of land assigned the contract of sale, on

which some payments remained due, to a third person, whom he then introduced to his vendor as the man to whom he had resold the land. Such assignee then told the vendor to look to him for the rest of the payments, to which the vendor replied that it made no difference to him; that he would make the deed to whoever made the last payment. Held, that there was no novation by which the assignee of the contract became bound for the purchase money yet to be paid. Osburn v. Dolan, 7 Wash. 62, 34 Pac. Rep. 433. A sale by a mortgagor of his interest in the mortgaged premises to one who agrees to pay off the mortgage does not release the mortgagor, unless the mortgagee agrees to look solely to the purchaser for payment of the debt. Campbell v. Clay (Colo. App.), 36 Pac. Rep. 909. An absolute deed conveying land as security for a debt is a security of a higher nature than a mortgage for the same debt on the same premises, and when the mortgage is entered satisfied, and surrendered up because of the execution of such a deed, the transaction operates as a novation. Patterson v. Evans, 91 Ga. 799, 18 S. E. Rep. 31. A married woman is not bound by an agreement of her husband that an indebtedness due her should be transferred to others without authority from or ratification by her. Argyle Co. v. McNeill, 46 Ill. App. 564. The mere surrender of a banker's deposit note on part payment of a deposit, though accompanied by the acceptance of a fresh note for the balance, does not in itself amount to a novation of the original contract so as to discharge the estate of a partner who, to the knowledge of the depositor, has died since the original deposit was made. Head v. Head, 3 Reports, 712. Where the holder of a note agrees to accept another as debtor in place of the maker, there is a complete novation of the debt, and the indorsers are discharged. Holliday v. Jackson, 22 Can. Sup. Ct. Rep. 479. Defendant had bought land from plaintiff, and gave him his note in part payment therefor. Afterwards defendant sold the land, and the purchaser agreed to pay the note. Plaintiff sold the indorsed note to the purchaser, who afterwards sued plaintiff upon it as indorser, and obtained judgment against him. Held, that defendant was liable to plaintiff upon the note, since plaintiff was not compelled to accept the purchaser as his debtor. Sharp v. Garnet, 54 Mo. App. 410. Where a deed of obligation was executed in 1866 as security for an antecedent unpaid note dated in 1862, and stipulated that the amount was payable according to the terms of the said note, it did not effect a novation; and the amount due by the note was prescribed in five years. Pare v. Pare, 23 Can. Sup. Ct. Rep. 243. A novation agreement by which a debtor agrees to pay the amount of his indebtedness to a third person, to whom his creditor is indebted, must, to be binding, be accompanied by an agreement between all the parties that the creditor is to be discharged by such payment. Badger Lumber Co. v. Meffert, 59 Mo. App. 437. An original debtor is not released because he conveyed premises mortgaged to secure the debt, and the grantee promised to pay it, and, with the consent of the creditor, did make a partial payment. First Nat. Bank v. Gardner, 57 Mo. 268. Where defendants sublet a contract to one who assigned to them moneys due the laborers, which defendants agreed to pay, they are liable where the subcontractors abandoned the work, and gave time checks to the laborers. Gleason v. Fitzgerald (Mich.), 63 N. W. Rep. 512. The transfer of a sum of money after the death of a partner in a bank from a current to a deposit account is a novation, so as to discharge the estate of the deceased partner from liability to the customer. Head v. Head (No. 2), 7 Reports, 167. Where the payee of a note accepts it from the maker in satisfaction of the debt of another, and then assigns the debt to him without recourse, there is a complete novation of the debt. Morse v. Wilcoxson (Ky.), 30 S. W. Rep. 612. Where a contract was made between the J Co. and the U Co., giving the U Co. rights to do various things, and the U Co. immediately sold to the N Co. the right to do a part of these things, though the N Co. agreed not to suffer any default under the contract, so far as its operations were concerned, and to perform all the stipulations of the contract, so far as its operations required, held, that there was no novation substituting the N Co. for the U Co. Jackson Iron Co. v. Negaunee Concentrating Co., 65 Fed. Rep. 298, 12 C. C. A. 636. For a creditor to substitute his creditor to his right of action on claims against his debtor, a new contract must be made releasing the original debt. Woodruff v. Hensel (Colo. App.), 37 Pac. Rep. 948. Where, in settlement of the debts of an insolvent firm, a creditor accepts the individual note of the partner appointed to wind up its affairs, and the firm debts are secured by a trust deed to him of the assets, there is not a novation so as to release the firm assets from the debt evidenced by the note. Karn v. Blackford (Va.), 20 S. E. Rep. 149. Where a new firm expressly assumes the debts of the old firm which it supplants, an acceptance of such assumption by a creditor of the old firm releases and discharges his debt, as against the old firm. Tysen v. Somerville (Fla.), 17 South. Rep. 567. Where a third person contracts in writing to pay the debt of another, and the creditor, with his consent, and relying on the contract, credits the debtor, and charges such person with the debt, he, by novation, becomes directly liable to the creditor. Pugh v. Barnes (Ala.), 19 South. Rep. 370. A transfer of property by the maker of a note to a third person to sell and pay the note out of the proceeds, made with the payee's consent, will not constitute a novation unless the payee accepted the stranger as his debtor in place of the maker, and released the maker from any obligation on the note. Pimental v. Marques, 109 Cal. 406, 42 Pac. Rep. 159. On a bill for services, the debtor wrote an order to a third person to pay the bill, who indorsed it, "Accepted, payable out of . . . my note to him, payable July 1, 1893, provided the note can be gotten here by that date." Held, that on fulfillment of the conditions of the acceptance a novation was created. Taylor v. Insley (Colo. App.), 42 Pac. Rep. 1046. In an action on an alleged contract of novation, it appeared that defendant agreed to substitute new mortgages for those by which the debt was secured; that plaintiff executed releases of the original mortgage security, and left them with an attorney, but subsequently withdrew them. It was not shown that releases of the old mortgages were ever given to the original debtor. A fair implication from the evidence was that the attorney was authorized to deliver these releases to the original debtor. Plaintiff and the original debtor testified that the release of the original debtor was on defendant's promise to pay the debt. Held, that the question whether the release was absolute, as claimed by plaintiff, or conditional on defendant's executing the new mortgages agreed on as security, was for the jury. Trudeau v. Poutre, 165 Mass. 81, 42 N. E. Rep. 508. Defendants were mortgagees of chattels, which were sold by the mortgagor to another with defendants' consent, and a bill of sale was executed to defendants by the mortgagor in an amount exceeding the sum due on the mortgage, and the purchaser was

to pay for same in monthly installments to defendants. There was evidence of an arrangement between defendants, the mortgagor and plaintiffs, creditors of the mortgagor, whereby defendants were to assume the debt due from the mortgagor to plaintiffs, and that plaintiffs looked to defendants for payment. After making two payments, the purchaser surrendered the property to defendants. Held, that it was proper to submit to the jury the question as to whether the arrangement between the parties amounted to a novation. Brown v. Neidhold (Mich.), 66 N. W. Rep. 349. Where, with the consent of the owner, a contractor of a building substitutes another in his place, and the original contractor releases all claims, and is wholly discharged from all obligations under the contract, it constitutes a novation, and not an assignment. Benham v. Banker-Edwards Bldg. Co., 60 Mo. App. 34. Where a State treasurer accepted from his predecessor, in payment of State funds, certificates of deposit issued by a bank in which the funds had been deposited for safekeeping, and thereupon redeposited the certificates under the depository law in the same bank which issued them, the subsequent cancellation of the certificates, and the State's acceptance of a credit on open account for their amount, operated as a novation, making the bank the State's debtor, and releasing the treasurer from liability. State v. Hill (Neb.), 66 N. W. Rep. 541. C contracted to build a house for defendant, and then sublet part of the work to plaintiff. Thereafter, money being due plaintiff for his work, defendant orally agreed to pay his bill, and deduct it from the amount due C, the latter being present and saying nothing. Held, that there was not a novation, but merely an oral promise, without consideration, to pay the debt of another. Ryan v. Pistone (Sup.), 35 N. Y. S. 81. Where a corporation transfers all its property, rights, and franchises to a new company incorporated with the same stockholders and directors as the old, and the new corporation adopts the contracts and assumes the liabilities of the old, the merger of the old into the new corporation creates a novation of the debts of the old company, though the creditors have not assented to the change. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co. (N. Car.), 23 S. E. Rep. 490. There can be no novation in the absence of an unqualified discharge of the original debtor by the creditor. Lowe v. Blum (Okla.), 43 Pac. Rep. 1063. Defendant purchased a mill site of plaintiff, executing his notes therefor. It was ascertained that another owned a half interest in a larger tract, including the mill site; and defendant purchased such interest, and also plaintiff's interest in the entire property, executing other notes to plaintiff, and receiving a conveyance of the entire tract. Held, that the second transaction did not operate as a novation of the former contract, the evidence showing that such was not the intention of the parties. Henry v. Nubert (Tenn. Ch. App.), 35 S. W. Rep. 444. A contract for the sale of certain lots in consideration of a cash payment and deferred installments to be paid on certain specified dates provided that any of the lots might be discharged on payment of the proportion of the purchase price applicable to each. The contract was assigned in writing to a third party, and the assignment was registered in the vendor's office. The assignee made several payments on the interest and principal as lots and parts of lots were sold by him, and an arrangement was made between the vendor and the assignee proportioning the payment necessary for the release of the lots based on their supposed value, and several of the lots and parts of lots were released according to such agreement, and not in the ratio of the full number of lots to the unpaid price. Held not to constitute a novation by substituting the assignee as debtor in place of the original vendee. Wilson v. Land Security Co., 26 Can. Sup. Ct. Rep. 149. Where the purchaser of a stock of goods agrees to pay all outstanding indebtedness of the seller, and a creditor of the seller agrees "to present its account for goods" to the purchaser, there is no substitution, and the seller remains liable to such creditor. Richardson Drug Co. v. Dunagan, 8 Colo. App. 308, 46 Pac. Rep. 227. There can be no novation of a debt without an unqualified discharge of the original debtor. Western White Bronze Co. v. Portrey (Neb.), 70 N. W. Rep. 383. Plaintiff, being indebted in separate amounts to defendant and another, gave defendant an order on one for the aggregate amount, and defendant agreed to collect it, and to pay over to the other creditor, the amount due him. Held, not a novation, though the other creditor assented to the arrangement. McLaughlin v. Gillings (Sup.), 41 N. Y. S. 22, 18 Misc. Rep. 56. The substitution of plaintiffs in place of the contractor who had undertaken work for defendant is not affected by an order on defendant, given by the original contractor to plaintiffs, who, at the contractor's instance, undertook to complete the work, where the order requested defendant to pay plaintiffs "the amount of their bill for labor and materials that they are furnishing for the job that I am doing for you, not to exceed the amount of my contract price of $1,200." Kennedy v. McKone, 41 N. Y. S. 782, 10 App. Div. 88. Where defendants guarantied to plaintiffs the bills of a watch company for goods bought by it of plaintiffs, with provision for the giving of notes by the company, with right of renewal or extension, and the company suspended operations, and turned over its entire assets and business to a new corporation, which assumed the company's liabilities, including its notes given to plaintiffs, and the notes, when they came due, were apparently renewed in the name of the new corporation, as if in pursuance of the prior contract with the company,—the same persons, to a large extent, being concerned in both companies,—the question whether there was a novation, discharging defendants, depends upon whether plaintiffs gave up their original debtor, and accepted its successor in its place, or merely treated the notes of the new company as evidences and means of payment, without intending to discharge the first company, and without doing any act which would discharge the guarantors, by prejudicing their interests. Robbins v. Robinson, 176 Pa. St. 341, 35 Atl. Rep. 337. Plaintiffs' intestate held a certificate of deposit in a bank in which defendants' testator was a partner. After the latter's death, plaintiffs surrendered the certificate, and took a new certificate. There was no direct evidence showing that they knew that defendants' testator was a member of the partnership, but it appeared that he was a prominent citizen of the town, well known to them; that he became a member in 1877, and so continued until his death, in 1891; that plaintiffs, as administrators, had had dealings with the bank since September, 1887. Held, that the circumstances justified a finding that they knew of his relations with the bank. Powell v. Derickson, 178 Pa. St. 612, 36 Atl. Rep. 167. An answer, by a partner, to a complaint on contract, which alleges that he had sold all his interest in the firm to the other partners; that they had agreed to carry out the contract, and released him from liability thereunder; that plaintiff had accepted the new firm as parties to the contract, and had received from them partial payments thereon,—shows a complete novation. Scott v. Hallock (Wash.), 16 Wash. 439, 47 Pac. Rep. 968.

BOOK REVIEWS.

SCIENCE OF LAW AND LAW MAKING.

This is an interesting book of some four hundred pages which practitioners as well as students would do well to read. It is in effect an introduction to law, a general view of its forms, and discussion of the question of codification. It is well written—the author, R. Floyd Clarke, of the New York Bar, evidently having given the subject much thought and examination. Those specially interested will find herein a summary of the arguments for and against codification of law. It is published by the McMillan Company, New York.

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This appears to be a most satisfactory work on an exceedingly difficult, and at the same time important, branch of the law. In the manner of its execution, it bears evidence of care and diligence. Nothing that pertains to the subject of railway bonds seems to have been ignored. It is clearly and concisely written, and the notes are full and comprehensive. In the successive chapters are discussed the Nature and Issue of Bonds, Rights of Bondholders, Rights of Coupon-holders, Guaranty of Bonds, Definition of Words and Phrases, Constructive Contracts, Notice, Mortgages and their Validity, What the Mortgage Covers, Including After-acquired Property, Priorities between Mortgages, and other Obligations of the Company, Trustees, Statutory Liens in Favor of Bondholders, Rolling Stock and Car Trusts, Preventive Remedies or Remedies of Bondholders for Interference with the Mortgaged Property, Remedies of Bondholders for the Enforcement of Bonds, Foreclosure and Sale, Jurisdiction, Citizenship and Removal of Causes, Pleadings, Parties in Suits Relating to Corporate Securities, Control and Disposition of the Mortgaged Property, Appointment, Removal and Discharge of Receivers, Title Passing Office and Duties of Receivers, Preferred Debts, Position of Creditors who make Expenditures, Powers of Court and Receivers in Management of Railways, Liabilities of Company and Receiver during Receivership, Compensation of Trustees and Receivers, Foreclosure Decrees, Distribution of Proceeds of Sale, Sales of Mortgaged Property, Rights of Purchasers at Sale, Remedies in Case of Objections to Sales, Appeals from Decrees and Orders, Railway Reorganization, Reconstruction and Compromise Agreements. The book is handsomely printed, has a good index, and is published by Little, Brown & Co., Boston.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCOUNT—Pleading.—In the absence of a demurrer for insufficient allegations with reference to a promise or undertaking to pay, the declaration was good, treated as an action on an account stated.—WARD V. STEWART, Ga., 29 S. E. Rep. 872.

2. ADMIRALTY — Carriage at Sea — Bill of Lading.—A stipulation in a bill of lading that, if any part of the goods cannot be found during the steamer's stay at the port of delivery, they shall be forwarded at the earliest opportunity, and the shipper shall not be liable for the delay or otherwise, is overridden by the provisions of the Harter act forbidding any stipulation lessening the obligation to carefully stow and deliver cargo, as applied to goods which were negligently stowed, and for which no search was made at the port of delivery, and which were subsequently lost at sea.—CALDERON V. ATLAS S. S. CO., U. S. S. C., 18 S. C. Rep. 588.

3. ASSIGNMENT OF SALARY — Attachment.—A duly recorded assignment of salary for the period of one year, for a valid consideration, is, in the absence of fraud, good as against attaching creditors.—CHASE V. DUBY, R. I., 40 Atl. Rep. 100.

4. ASSUMPSIT—Sheriffs—Liability.—Where a sheriff is sued in general *assumpsit* by a judgment debtor to recover money paid him on an execution issued on a void judgment, the execution is admissible in evidence under the general issue.—MILLER V. HAHN, Mich., 74 N. W. Rep. 1051.

5. ATTACHMENT — Stock in Foreign Corporation.—In Massachusetts, there being no statute authorizing it, there can be no attachment of shares of stock in a foreign corporation owned by a non-resident defendant.—FINNEY V. NEVILLS, U. S. C. C., D. (Mass.), 86 Fed. Rep. 97.

6. ATTACHMENT BOND — Liability of Sureties.—Code Civ. Proc. § 540, provides that, when a sheriff attaches a defendant's property, he is required to release it when defendant either gives an undertaking sufficient to satisfy the demand, or gives an undertaking in an amount equal to the value of the property attached, Held, that an agreement of sureties, under said section, to pay the value of the property released, does not include the liability of the defendant in attachment.—CURTIN V. HARVEY, Cal., 52 Pac. Rep. 1077.

7. BANKRUPTCY — Schedule — Homestead.—Where a bankrupt in his petition and schedules declared that his homestead had been allotted to him, mentioning the date of the allottment and the names of the ap-

praisers, a claim to the land by his heir by descent, and her contention at the same time that there was no evidence that the homestead had been legally allotted, are inconsistent.—WILLIAMS v. SCOTT, N. Car., 29 S. E. Rep. 877.

8. BANKS—Checks — Forging Indorsement.—Where an agent, after the principal's drawing check in the line of his duty to pay its creditor, forges the payee's name, and thus obtains money from the bank thereon, the principal is not chargeable with knowledge through notice to the agent, so as to render it negligent in not sooner notifying the bank, after a duplicate check, drawn by the agent, and sent to the creditor, was, together with the first check, charged on the principal's books to the creditor's account.—UNITED SECURITY LIFE INS. & TRUST CO. OF PENNSYLVANIA v. CENTRAL NAT. BANK, Penn., 40 Atl. Rep. 97.

9. BANKS AND BANKING—Liability of Stockholders.—Under the constitution and statutes of Washington, which provide: "That each stockholder of any banking association shall be individually and personally liable, equally and ratably, and not one for another, for all the contracts, debts and engagements of such corporation or association accruing while they remain stockholders to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares,"—an action to enforce such liability may be maintained by a receiver.—HOWARTH v. ELLWANGER, U. S. C. C., N. D. (N. Y.), 86 Fed. Rep. 54.

10. BILLS AND NOTES—Negotiability.—Where notes call for payment of a certain sum "and attorney's fees," the latter being uncertain, indefinite, and to some extent contingent, held, that this provision renders the notes not negotiable by the law merchant.—ROADS v. WEBB, Mo., 40 Atl. Rep. 128.

11. CARRIERS—Assault on Passenger by Employee.—Where the relation of carrier and passenger existed, the conduct of an employee in inflicting violence on a passenger, although outside the scope of his authority, and willful and malicious, subjects the carrier to liability as fully as though it encouraged the act.—WILLIAMS v. GILL, N. Car., 29 S. E. Rep. 879.

12. CARRIERS OF PASSENGER — Negligence—Assumption of Risk.—A shipper of live stock, who receives from the railroad company undertaking the transportation of such stock a free pass, to enable him to care for his stock in transit, assumes such risks and inconveniences as necessarily attend upon caring for such stock, and, modified accordingly, the liability of the railroad company to such shipper for personal injuries by him sustained by reason of the negligence of its employees is that of a common carrier for hire.—OMAHA & R. V. R. CO. v. CROW, Neb., 74 N. W. Rep. 1066.

13. CHATTEL MORTGAGES—Possession—Purchaser.—A firm gave a chattel mortgage, and before the maturity of the debt sold the property to G Co. E & Co. owned the stock in G Co., and furnished money to be used in its business, for which G Co. afterwards confessed judgment in favor of E & Co., and the property was seized under execution. Held, that E & Co. were the real parties in interest in G Co., and had only such rights in the property as were acquired by G Co.; and that since G Co., who purchased the property before the maturity of the mortgage debt, could not contest the validity of the mortgage on the ground that the mortgagee did not take possession when his debt matured, E & Co. could not attack the mortgage on that ground.—SONDHEIMER v. GRAESER, Ill., 50 N. E. Rep. 174.

14. CHATTEL MORTGAGES—Possession and Sales by Mortgagor.—Where the mortgagor of a stock of merchandise remains in possession thereof, and continues to sell the same in the usual course of business, pursuant to agreement with the mortgagee that he will apply the proceeds of all sales upon the debt secured by the mortgage, the court cannot pronounce the transaction fraudulent as a matter of law.—LEPIN v. COON, Neb., 74 N. W. Rep. 1079.

15. CONTEMPT—Affidavit—Sufficiency.—A proceeding against a party for contempt is in the nature of a prosecution for a crime, and the rules of strict construction applicable in criminal proceedings are governable therein.—HERDMAN v. STATE, Neb., 74 N. W. Rep. 1097.

16. CONTEMPT OF COURT——What Constitutes.—The publication of a newspaper article of an insolent and contemptuous character, concerning the supreme court, in relation to an action then pending before it, tending to embarrass or influence its action therein, is a contempt of court both at common law and within the terms of 2 Ballinger's Codes & St. § 5798, defining disorderly, contemptuous, or insolent behavior toward a judge while holding court, tending to impair its authority or to interrupt the due course of a trial or other judicial proceedings, as contempt of court.—STATE v. TUGWELL, Wash., 52 Pac. Rep. 1056.

17. CONTRACT — Building Contractor's Bond.—One who furnishes a contractor for the erection of a court house with materials used in the building may maintain an action for their value on the contractor's bond given to the county as security for the performance of his contract, requiring *inter alia*, the contractor to satisfy all lawful claims of laborers and material-men.—PICKLE MARBLE & GRANITE CO. v. CLAY, Neb., 74 N. W. Rep. 1062.

18. CONTRACT—Construction.—The words "gross ton," as used in a contract to mine asphaltum, do not necessarily mean "twenty hundred weight," defined as a ton by Pol. Code, § 3215, since Code Civ. Proc. § 1861, provides that, though the terms of a writing are supposed to be used in their general acceptation, yet "evidence is admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly."—HIGGINS v. CALIFORNIA PETROLEUM & ASPHALT CO., Cal., 52 Pac. Rep. 1080.

19. CONTRACTS — Duress.—It is those contracts made under fear of unlawful arrest, and not those executed under threat of lawful imprisonment, which can be avoided on the ground of duress.—MCCORMICK HAR. MACH. CO. v. MILLER, Neb., 74 N. W. Rep. 1061.

20. CONTRACT TO SELL LAND—Construction.—In view of the facts that a real estate broker gave a memorandum in writing to one who thereon claims rights as a purchaser of real property, in which memorandum it was recited that the proposed sale was subject to the approval of the owner of the real property, and that from the entire evidence adduced in the case it was shown that there was a prompt disapproval of said terms when submitted to the owner of the real property, it is held that the district court properly instructed the jury to return a verdict against said claimant.—POWELL v. BINNEY, Neb., 74 N. W. Rep. 1073.

21. CONTRACT UNDER SEAL—Presumptions.—Where a contract on its face purports to be given under the hands and seals of the signers thereof, and seals appear opposite some of the names signed, it will be presumed that all the signers intended to seal it, or that they adopted some one of the seals appended.—RYAN v. COOKE, Ill., 50 N. E. Rep. 213.

22. CORPORATIONS—Foreign Corporation.—A foreign corporation cannot maintain in a court of this State, against another foreign corporation, an action begun by suing out an attachment which was never levied upon any property of the defendant, and which the plaintiff had not sought to make effectual otherwise than by causing a summons of garnishment to be served upon a person not himself indebted to the defendant, but who was an agent of a third foreign corporation, a debtor of the defendant, not having an office or transacting any business in this State.—ASSOCIATED PRESS v. UNITED PRESS, Ga., 29 S. E. Rep. 869.

23. CORPORATIONS — Foreign Corporation — Stockholder.—A suit in equity may be maintained by a cred-

itor of a corporation against a stockholder only in the courts of the State in which the corporation is created.—STATE NAT. BANK OF CLEVELAND, OHIO, v. SAYWARD, U. S. C. C., D. (Mass.), 86 Fed. Rep. 45.

24. CORPORATIONS—Joint Stock Companies—Stockholders.—Under How. Ann. St. ch. 116, § 6, imposing on stockholders a secondary liability for goods sold to a co-operative mercantile association, where goods were sold on open account, which was afterwards closed by time acceptances of the association, on which judgment was rendered, and execution issued and returned unsatisfied, a payment of the account could not be inferred, and the stockholders were liable.—KIRKPATRICK V. BESSALO, Mich., 74 N. W. Rep. 1042.

25. CORPORATIONS—Liability of Stockholders.—As between the stock subscribers and the creditors of a corporation, each stock subscriber is liable to the extent of his unpaid stock subscription. As between themselves, each stock subscriber is liable for his proportionate share of the corporate debts; and one stock subscriber, who has been compelled to pay more than his proportionate share, may sue his co-subscribers for contribution.—VAN PELT V. GARDNER, Neb., 74 N. W. Rep. 1083.

26. CORPORATIONS — Limitations of Actions.—The statutory right of action against the directors of a corporation for declaring dividends when the corporation is insolvent accrues, at least, when the debt is due; and neither an agreement for an extension between the corporation and the creditor, nor a part payment by the corporation, stops the running of the statute.—PATTERSON V. THOMPSON, U. S. C. C., D. (Oreg.), 86 Fed. Rep. 85.

27. CORPORATIONS—Powers—Mortgages.—In an action by a creditor of a corporation to set aside a mortgage given by the company to secure an individual debt of the stockholders, a finding that the stockholders' debt was contracted three months earlier than it was in fact contracted was harmless error, where it was not claimed that the lapse of time between the contracting of the debt and the giving of the mortgage was evidence of bad faith.—WASHINGTON MILL CO. V. SPRAGUE LUMBER CO., Wash., 52 Pac. Rep. 1067.

28. COVENANTS—Liability of Heirs—Vendor and Purchaser.—Plaintiff's intestate owned one-third of certain land, and her children two-thirds thereof, which they inherited from their father. She gave to the defendant a bond for a deed, wherein she covenanted, for herself and her heirs, to convey the land to him, and died without performing her covenant. Held, that the children, her sole heirs, are not bound by her covenant, so far as it purports to affect the interest in the land which they had when the covenant was made, and they are not bound to convey such interest to the defendant.—LOVERIDGE V. COLES, Minn., 74 N. W. Rep. 1169.

29. CRIMINAL EVIDENCE—Assault with Intent to Rob—Evidence.—Husband and wife were indicted for an assault to rob. Testimony as to declarations and conduct of the wife, wholly disconnected with the alleged robbery, was admitted. Held error.—RIPPETOE V. PEOPLE, Ill., 50 N. E. Rep. 166.

30. CRIMINAL EVIDENCE—Embezzlement.—Upon the trial of one indicted for the offense of embezzlement, it is competent for the State, after showing the receipt by the accused of the public fund alleged to have been embezzled and his failure to account for the same, to introduce evidence that, at or about the time the embezzlement was alleged to have been committed, the accused was pressed for money and resorted to devious methods in order to obtain it, that he gave false accounts as to the disposition of the money so intrusted to him, and, in making such account, had endeavored to conceal the real state of affairs by forging and uttering receipts and other papers which were presented by him as vouchers.—BRIDGES V. STATE, Ga., 29 S. E. Rep. 859.

31. CRIMINAL LAW—Assault with Intent to Murder.—Where the alleged offense was either an assault with intent to murder, or a case of self-defense, no charge on aggravated assault was required.—BARNES V. STATE, Tex., 45 S. W. Rep. 495.

32. CRIMINAL LAW — Conspiracy — Indictment.—The averment, in an indictment under Rev. St. § 5440, that defendants conspired to commit the "offense of corruptly endeavoring to influence a petit jury of the Circuit Court of the United States for the District of Oregon in the discharge of its duty," is insufficient, because it omits any averment of facts constituting the offense for which the conspiracy was formed, by which it can be identified.—UNITED STATES V. TAFFE, U. S. D. C., D. (Oreg.), 86 Fed. Rep. 118.

33. CRIMINAL LAW—Verdict—Indictment.—Where the defendant was tried under an indictment containing four counts, each charging a distinct crime, and the jury rendered a verdict of guilty on three counts, but announced that they disagreed on the fourth, the verdict thus rendered was valid.—SELVESTER V. UNITED STATES, U. S. S. C., 18 S. C. Rep. 581.

34. DEEDS—Mental Capacity.—In determining a question of mental capacity to execute a deed, the question is not whether the grantor's mental powers were impaired, or whether she had ordinary capacity to do business, but whether she had any—the smallest—capacity to understand what she was doing, and to decide intelligently whether or not she would do it.—MANN V. KEENE GUARANTY SAV. BANK OF KEENE, N. H., U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 51.

35. DEEDS—Quitclaim Deed.—When an error in the judgment appears in the record proper, the appellate court will correct it, though no exception has been taken. A quitclaim deed from a mortgagee to a mortgagor, including the mortgaged premises, does not operate as a release of the mortgage, where the deed expressly stated that it was given for the purpose of quitclaiming the mortgagee's interest in the property, if any there was, arising out of a certain contract made long prior to the giving of the mortgage.—BARR V. FOSTER, Colo., 52 Pac. Rep. 1101.

36. DOWER—Release—Antenuptial Agreement.—The manner in which dower may be barred by an antenuptial arrangement between the parties concerned is regulated by statute; and, in the absence of any contravening equitable considerations, the method prescribed by statute is exclusive.—FELLERS V. FELLERS, Neb., 74 N. W. Rep. 1077.

37. EJECTMENT—Title—Evidence.—In an action to try title, where both parties claim from a common source, the fact that it was adjudged on a former appeal that defendant's title is void does not permit him to show a superior title in some one else than the common source, unless he connects himself therewith.—BERNHARDT V. BROWN, N. Car., 29 S. E. Rep. 884.

38. ELECTIONS—Legality of Ballots—Pasters.—Election Law, § 14, provides that the names of all candidates shall be printed on the ballots. Section 23 provides that, when the name whom the elector desires to vote for is not printed on the ballot, he may write such name thereon. Held, that ballots on which the candidate's name was placed by a paster prepared outside the voting booth were illegal, and properly rejected in the court.—FLETCHER V. WALL, Ill., 50 N. E. Rep. 230.

39. EQUITY—Bills of Review.—On the hearing of a petition for leave to file a bill of review, affidavits may be introduced denying the allegations of the petition.—LOTH V. LOTH, Mich., 74 N. W. Rep. 1046.

40. EQUITY—Pleading—Parent and Child.—A mother sued to cancel a deed to her daughter, on the ground of fraud and want of consideration. The daughter's answer alleged that the consideration was her agreement to support her mother, which the latter denied in her reply. Held, that a decree finding that the daughter had refused to comply with her agreement, and declaring a lien on the land for the yearly value of such support, was within the issues made by the pleadings.—PATTON V. NIXON, Oreg., 52 Pac. Rep. 1048.

41. EVIDENCE—Parol Evidence—Patent Ambiguities.—Description in a decree of property as two lots in a certain town and county, and description in a deed as property in a certain county, being a certain lot on the square, without any reference to the town, contain patent ambiguities, which cannot be aided by evidence so as to pass legal title.—TAFFINDER V. MERRILL, Tex., 45 S. W. Rep. 477.

42. FALSE IMPRISONMENT.—A ministerial officer is not liable in an action for false imprisonment for the arrest of a person under a warrant regular on its face, and issued by proper authority, where there is no abuse thereof in the manner of its execution.—KELSEY V. KLABUNDE, Neb., 74 N. W. Rep. 1099.

43. FEDERAL COURTS — Following State Courts.—Where the Supreme Court of Missouri held that an estate passed by a will is a statutory estate, and that the effort of the testator to further control the estate was in contravention of the statutes of Missouri, the federal court will follow such decision.—BUFORD V. KERR, U. S. C. C., W. D. (Mo.), 86 Fed. Rep, 97.

44. FEDERAL COURTS—Jurisdiction — Citizenship.—The jurisdiction of the federal court having attached in an action at law against the receivers of a railroad, such jurisdiction is not lost because the ownership of the railroad subsequently passes to citizens of the same State as the plaintiff, nor by reason of an order of a court in another district discharging the receivers, especially when it expressly provides that pending cases shall not be affected.—CROSS V. EVANS, U. S. C. C. of App., Fifth Circuit, 86 Fed. Rep. 2.

45. FEDERAL COURTS—Supreme Court—Jurisdiction.—There is no provision in Act March 3, 1891, or any other act, authorizing an appeal to the supreme court from a decree of the circuit court of appeals, affirming, without direction, an interlocutory order of the circuit court for the issue of a temporary injunction.—KIRWAN V. MURPHY, U. S. S. C., 18 S. C. Rep. 592.

46. HUSBAND AND WIFE—Community Property.—The administrator of the wife's separate estate is without authority to have community property sold; particularly as it does not appear that it was for the purpose of paying debts of the community.—SUCCESSION OF FERNANDEZ, La., 23 South. Rep. 457.

47. HUSBAND AND WIFE — Validity of Slave Marriage.—Where a slave man and woman were living together as husband and wife in accordance with a slave marriage when Laws 1865, ch. 4, § 3, was enacted, and continued to live and cohabit together, and probably till after Const. 1869, art. 12, § 22, was adopted, the law and the constitution both legalizing such a marriage relation whenever the parties so desired, they will be presumed to have assumed the relation the law intended to permit, and must be held to be husband and wife.—REED V. MOSELEY, Miss., 23 South. Rep. 451.

48. INSURANCE — Cancellation of Insurance Policy.—Where an insurer has rightfully declared an insurance contract at an end, because of the insured's obtaining additional insurance on the insured property without the consent of the first insurer contrary to the provisions of the first policy, such insured has no cause of action against the insurer for the unearned premium.—FARMERS' MUT. INS. CO. OF NEBRASKA V. HOME FIRE INS. CO. OF OMAHA, Neb., 74 N. W. Rep. 1101.

49. INSURANCE—Conclusiveness of Receipt.—One who receipts for an insufficient amount paid on a life insurance policy, and surrenders the same, relying solely on the statements of the insurer respecting her rights thereunder, which she has since learned were untrue in fact and in law, is not bound thereby.—CLARK V. EQUITABLE LIFE ASSUR. SOC., Miss., 23 South. Rep. 453.

50. INSURANCE — Intentional Injury.—Where a policy of insurance provides, "The member hereby agrees that the Travelers' Protective Association shall not be liable for death when caused by intentional injuries inflicted by the member or any other person," and the proof shows the insured was murdered, his death was caused by intentional injuries, and no recovery can be had.—TRAV. PRO. ASSN. OF AMER. V. LANGHOLZ, U. S. C. C. of App., Fifth Circuit, 86 Fed. Rep. 60.

51. INTOXICATING LIQUORS — Illegal Sales.—Money was furnished by a city to a person, to enable him to buy beer to detect violations of an ordinance. A person willingly sold him beer. Held, that the offense was in the selling, and the accused could not complain of the city's acts.—CITY OF EVANSTON V. MEYERS, Ill., 50 N. E. Rep. 204.

52. INTOXICATING LIQUOR—Local Option Elections.—Ky. St. § 2554, providing for local option elections on a written petition signed by voters of each precinct of the territory to be affected equal to 25 per cent. of the votes cast in each of said precincts at the last preceding general election, is complied with when separate petitions are filed from every precinct in the territory to be affected, signed by over 25 per cent. of the voters in such precincts, as above provided.—SMITH V. PATTON, Ky., 45 S. W. Rep. 459.

53. JUDGMENT—Joint Defendants.—Hill's Ann. Laws, §§ 244, 245, providing that when, in an action on a joint contract, it is determined that only a part of the defendants are liable, judgment may be rendered against those liable, and the others dismissed, do not permit a judgment against both defendants for a part of the amount sued for, and a several judgment against one for the remainder, in view of section 93, providing that the causes of action which may be united in one complaint must affect all the parties to the action.—HAYDEN V. PEARCE, Oreg., 52 Pac. Rep. 1049.

54. JUDGMENT—Vacation.—Under Const. art. 8, § 17 and Code Civ. Proc. § 38, abolishing terms of court in counties comprising judicial districts, and sections 1720, 1722, 1723, providing a method for review of judgments by motion for new trial, and by appeal from order denying or granting the same, or from final judgment, and not otherwise, a court in such districts, having regularly made an appealable order, has no power to set it aside on its own motion; it not having been made inadvertently or improvidently.—WHITBECK V. MONTANA CENT. RY. CO., Mont., 52 Pac. Rep. 1098.

55. LIFE INSURANCE—False Representations.—An abstract of the application and medical examination contained in the last sheets of the policy introduced by plaintiff will be presumed, in the absence of any evidence of mistake, to be correct, and they are competent evidence of the contents, execution, and genuineness of the originals; and if, in connection with the proofs of loss also introduced by plaintiff, they show a breach of the warranty in the application, there can be no recovery.—SLADDEN V. NEW YORK LIFE INS. CO., U. S. C. C. of App., Seventh Circuit, 86 Fed. Rep. 102.

56. LIFE INSURANCE—Premiums.—To constitute a life insurance policy operative and of force, it was necessary that the first premium should be paid, and in an action on the policy there was evidence sufficient to sustain a finding that the general manager of the company had extended credit to the party named in the policy for the payment of the first premium. Held, that the question of whether such credit had been given was a proper one to submit to the jury, and, further, that such question was within the issues presented by the pleadings in the case at bar.—UNION LIFE INS. CO. OF OMAHA V. HAMAN, Neb., 74 N. W. Rep. 1090.

57. LIMITATIONS—Loan—Demand.—Where no time is agreed upon between the parties as to when a loan made shall mature, and demand for payment is thereafter made by the lender, a suit upon open account filed more than four years after such demand is barred by the statute of limitations.—POOLE V. TRIMBLE, Ga., 29 S. E. Rep. 871.

58. LIMITATIONS—Pleading.—Under Rev. St. par. 2828, providing that limitations, to be available as a defense, must be specially pleaded by answer, a pleading alleging facts sufficient as such defense is an answer, although it contains other matter, worded after the manner of demurrer; and a judgment for plaintiff on mo-

tion in such a case was erroneous.—WAGENER V. BOYCE, Ariz., 52 Pac. Eep. 1122.

59. LIMITATION OF ACTIONS—Arkansas Statutes.—The provision contained in Rev. St. Ark. 1837, ch. 91, § 7, barring "all special actions on the case" after the lapse of one year, was repealed by implication by the code of procedure adopted in that State in the year 1868, so far as it affected actions on the case other than actions for crim. con., assault and battery, false imprisonment, slander, and actions for words spoken whereby special damages are sustained. It was accordingly held that said provision has no application to an action on the case brought against the directors of a national bank under Rev. St. § 5239, for making excessive loans, or to actions brought against such officers for other acts, either of misfeasance or non feasance.—COCKRILL V. COOPER, U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 7.

60. MANDAMUS—Health — Suppression of Epidemic.—*Mandamus* is the proper remedy to compel a board of supervisors to pay bills for medical and other services, rendered in time of epidemic, at the instance of the township board of health, and duly allowed and certified by it.—MCKILLOP V. BOARD OF SUPERS. OF CHEBOYGAN COUNTY, Mich., 74 N. W. Rep. 1050.

61. MANDAMUS—Issue of Fact—Dismissal.—In an original proceeding in the supreme court for a writ of *mandamus*, where all the material allegations of fact in the petition have been denied by the answer, and no replication has been filed by petitioners, nor other steps taken by them to have an issue of fact formed and tried in conformity to the practice in such cases, their petition can only be dismissed at their costs.—PEOPLE V. HERCER, Ill., 50 N. E. Rep. 230.

62. MASTER AND SERVANT—Injury to Employee—Vice-principal.—The chief engineer of a refrigerator company having general charge of the engine room and freezing department, of which he is foreman, and in which capacity he gives orders to the men in that department and the authority to engage men for short jobs in the manager's absence, is not a vice-principal, so as to make the master liable for his negligence in directing removal in a certain manner of ice from the pipes, resulting in the fall of the pipes and injury to the employee.—PREVOST V. CITIZENS' ICE & REFRIGERATING CO., Penn., 40 Atl. Rep. 88.

63. MASTER AND SERVANT—Master's Liability.—An employer is not bound to indemnify an employee for injuries suffered by the latter in the ordinary risks of the business in which he is employed.—MCKEEVER V. HOMESTAKE MIN. CO., S. Dak., 74 N. W. Rep. 1053.

64. MASTER AND SERVANT—Negligence of Master.—The switching of cars in the nighttime on the main tracks of a railroad, with no lights displayed, or other precautions used, to warn approaching trains of the obstructed track, resulting in the collision with the obstructing cars of a freight train dispatched with no notice or warning of the obstruction, will be deemed negligence in the railroad company, subjecting it to damages caused by the collision.—MCGRAW V. TEXAS & P. R. Co., La., 23 South. Rep. 461.

65. MASTER AND SERVANT—Safe Appliances—Imputed Negligence.—Where certain boards placed by servants near the top of a lumber pile, so as to project several feet to permit a scaffold to be built thereon, were defective because of knots in them which caused them to break under plaintiffs' weight, knowledge of such defect must be imputed to the master.—EDWARD HINES LUMBER CO. V. LIGAS, Ill., 50 N. E. Rep. 225.

66. MECHANICS' LIENS — Landlord and Tenant.—Though contractors, subcontractors, architects and builders shall be the agents of the particular people for whom they act, and persons in control of property shall be regarded as the agents of the owners in and about the particular premises, under Rev. St. par. 2280, providing that the word "agent," as used in the mechanic's lien act, shall be construed to include all contractors, subcontractors, architects, builders and persons who have the charge and control of any property on which labor has been performed or material furnished, the leaseholder is not, by virtue of such relation, the agent of the lessor.—GATES V. FREDERICKS, Ariz., 52 Pac. Rep. 1118.

67. MECHANICS' LIENS—Mining Improvements—Filing Contracts.—A contract by which the owner of a mining claim agrees to sell a half interest to S, in consideration of the expenditure of $3,500 in developing the claim, is not within mechanic's lien law of 1893, providing, in case of contract for work between the reputed owner and a contractor, the contract shall operate as a lien, and, when the amount to be paid thereunder is over $500, it shall be in writing and recorded, and, if not, the labor and material done and furnished shall be deemed done and furnished at the special instance of the owner, and a lien shall be had therefor. Therefore the failure to record such contract does not affect the right of third persons to a lien under a contract to do work for S on the claim.—MAHER V. SHULL, Colo., 52 Pac. Rep. 1115.

68. MORTGAGES—Judgment—Lien.—Where, under a decree foreclosing one of two mortgages of equal priority given to plaintiff in one transaction and covering the same lands, the appraisers erroneously deducted from the value of the premises the amount of the judgment as a senior lien, the plaintiff, being the purchaser at the foreclosure sale, cannot be heard, in a subsequent action by him to foreclose the other mortgage, to assert that such judgment was the junior lien.—FARMERS' LOAN & TRUST CO. V. SCHWENK, Neb., 74 N. W. Rep. 1063.

69. MORTGAGES—Judgment — Parties.—After a deed has been recorded, conveying certain land to plaintiff, the grantor died; and defendant proved certain claims (secured by a trust deed on said land, which was recorded before plaintiff's deed) before the probate court administering his estate, and the land was sold, by order of court, to defendant, to satisfy his claims, and a deed executed therefor. Held that, while the conveyance to plaintiff was void with reference to the mortgage rights of defendant, yet it was not void in so far as it affected the transfer of the title subject to such mortgage rights, and the probate court could not devest plaintiff by proceedings to which he was not a party.—HAYS V. TILSON, Tex., 45 S. W. Rep. 479.

70. MORTGAGES—Payment.—The owner of land to which another holds a trust deed securing the payment of money, on the payment of which the land was to be released, sued to compel the holder of the trust deed to execute releases, alleging a compliance on the owner's part with his obligation. Held, that the owner must prove an absolute payment, and that a deposit which was under his control would not suffice.—BLACK V. SMITH, Colo., 52 Pac. Rep. 1108.

71. MORTGAGES—Real Estate Held as Collateral.—In an agreement between a debtor and his creditor, the amount of the indebtedness was stated, and the debtor agreed to pay the same in installments at fixed times, and it was provided that upon such payment real and personal property which had been previously owned by him, and of which he had or was to have possession, was to be reconveyed to him. In a suit brought by him after paying some of the installments, and while in default as to the residue, for relief against the strictness of the agreement, held, that the transaction amounted in substance to a mortgage, which might be redeemed, though the law day had passed.—KILGOUR V. SCOTT, U. S. C. C., S. D. (N. Y.), 86 Fed. Rep. 89.

72. MORTGAGES—Redemption—Accounting.—The rule in this State is to allow, in an accounting between mortgagor and mortgagee, a commission on rents collected as compensation for care of the property, procuring tenants, looking after repairs, collecting rents and the like. Held, that the allowance of this commission is not prohibited by an express stipulation between the parties in which it was agreed that the mortgagee might deduct from the net rents any commissions that he might have to pay for collections, although it appeared that the mortgagee collected the

rents himself, and did not pay anything for collecting.—BRADLEY v. MERRILL, Me., 40 Atl. Rep. 132.

73. MORTGAGE FORECLOSURES—Inventions.—A trustee in insolvency of a mortgagor corporation, who is appointed after institution of foreclosure proceedings and after the corporation has answered admitting the allegations of the bill, is not entitled to intervene and file an answer except in the place of the corporation and as representing its rights alone; nor can he apply for the removal of a receiver appointed in the foreclosure proceedings except in the right of the defendant company.—CENTRAL TRUST CO. OF NEW YORK v. WORCESTER CYCLE MFG. CO., U. S. C. C., D. (Conn.), 86 Fed. Rep. 35.

74. MUNICIPAL CORPORATIONS—Street Improvements—Ordinance.—An ordinance authorizing the curbing and guttering of a street specified the materials for the curbing and its width, but did not specify its height. Held, that the ordinance was invalid, as not sufficiently describing the work.—HOLDEN v. CITY OF CHICAGO, Ill., 50 N. E. Rep. 181.

75. MUNICIPAL IMPROVEMENTS — Ordinance — Sufficiency.—An ordinance providing that a water service pipe be laid from certain lots, and connected with the public main water pipe in the street adjoining said lots, the work to be done under the superintendence of the department of public works, fails to set forth the nature, character, locality and description of the proposed improvements, and is void.—PEOPLE v. WARNEKE, Ill., 50 N. E. Rep. 221.

76. NATIONAL BANKS—Increase of Stock.—Subscribers to a duly authorized increased issue of stock by a national bank, who accept certificates therefor, vote the stock by proxy, and take dividends thereon, cannot question the validity of such stock, as against the receiver, after the bank has become insolvent.—TELLINGHAST v. BAILEY, U. S. C. C., S. D. (Ohio), 86 Fed. Rep. 46.

77. NATIONAL BANKS—Powers—Estoppel.—A national bank which deals in stocks of another corporation, in violation of the national banking law, may urge its want of power in avoidance of liability as a stockholder; and this, though it accepted dividends on such stock.—CHEMICAL NAT. BANK OF NEW YORK v. HAVERMALE, Cal., 52 Pac. Rep. 1071.

78. NEGLIGENCE — Contractors for River Improvements.—Contractors making rock excavations on government property for river improvements are to be considered, so far as regards their duty to avoid injuring third persons, as owners of the premises, and are not required to use extraordinary care, such as covering their blasts, but only ordinary care. Passengers on river steamboats, which are permitted to land near the place where the blasting is carried on, with the express understanding that the boat owner must assume all responsibility, are to be regarded as there by mere permission or sufferance, and at their own peril, if ordinary care is used.—SMITH v. DAY, U. S. C. C., D. (Oreg.), 86 Fed. Rep. 62.

79. NEGLIGENCE—Passenger on Elevator.—In an action to recover for personal injuries received while in defendant's elevator, where the only question of negligence upon which plaintiff was entitled to recover was defendant's negligence in the operation, and failure to have the most improved safety appliances, or to keep them in good working order, evidence as to the carrying power of the car was properly excluded.—HARTFORD DEPOSIT CO. v. SOLLITT, Ill., 50 N. E. Rep. 178.

80. PARENT AND CHILD—Guardian.—A father is the natural guardian of his infant children, and is, therefore, the proper person to conduct litigation in their behalf, and to control the same as next friend, unless his interests be hostile, or he be guilty of some default or neglect.—BERNARD v. MERRILL, Me., 40 Atl. Rep. 136.

81. PARTNERSHIP CONTRACT — Consideration.—Agreement for partnership must have consideration; and the mere naked promise of one person that another shall share in the profits of his enterprise, where the other furnishes or does nothing toward the common enterprise, is void.—TRAYES v. JOHNS, Colo., 52 Pac. Rep. 1113.

82. PARTNERSHIP—Surviving Partner — Powers and Liabilities.—The surviving partner of an insolvent firm has power to execute a mortgage on the firm assets to secure the payment of a firm debt.—BURCHINELL v. KOON, Colo., 52 Pac. Rep. 1100.

83. PLEADING—Answer — Res Judicata.—An answer setting up a plea of *res judicata* alleged that the parties to the former suit were the same, and the issue was the same as in the present action (setting it out); that the former suit involved the same property and right of possession; that it was instituted before a justice of the peace, and an appeal taken from his judgment to the circuit court, where the cause was tried and a judgment rendered for defendants; that an appeal was prayed to the supreme court, and granted on condition that plaintiff should give bond; that he failed to give bond, and on motion the appeal was dismissed for want thereof. Held, that the defense was sufficiently pleaded.—DANIEL v. GUM, Tenn., 45 S. W. Rep. 468.

84. PLEADING—Answer — Verification.—Under Rev. St. par. 735, requiring verification of an answer denying execution of the written instruments sued on, the execution of an instrument not set out in the complaint is not taken as confessed by failure to verify the answer, even though the complaint allege a contract necessary to be evidence in writing.—PILLING v. ST. LOUIS REFRIGERATOR & WOODEN GUTTER CO., Ariz., 52 Pac. Rep. 1125.

85. PLEADING — Cloud on Title.—A petition alleging that plaintiff acquired title to certain real estate at a foreclosure sale under a deed of trust from the owner of the property made and duly recorded prior to defendant's levy of attachment, which he was holding without sale as a cloud on plaintiff's title, to extort money from him, does not state a cause of action, nor show a cloud on plaintiff's title.—CARVER v. FIRST NAT. BANK OF CROCKETT, Tex., 45 S. W. Rep. 475.

86. PRINCIPAL AND AGENT — Personal Liability of Agent.—In an action to recover for labor and materials furnished in the erection of a building, under a contract with defendant, where defendant claimed that he was acting merely as chairman of the building committee of a certain club, and was therefore not personally liable, the fact that defendant had previously filed a sworn statement in a mechanic's lien proceeding by himself against the building in question, in which he claimed for the work and materials in controversy, as principal and contractor, affected his credit as a witness, but did not render him incompetent to testify in such action.—SHARP v. SWAYNE, Del., 40 Atl. Rep. 113.

87. RAILROADS—Mechanics' Liens.—A railroad bridge becomes a part of the permanent structure of a railroad, and a mechanic's lien cannot be maintained for work performed and material furnished for a bridge as against liens created by prior mortgages on the railroad.—CLEVELAND, ETC. RY. CO. v. KNICKERBOCKER TRUST CO. OF NEW YORK, U. S. C. C., N. D. (Ohio), 86 Fed. Rep. 73.

88. RAILROAD COMPANIES—Injuries to Persons on Track.—Deceased, stepping to one side between the track and a platform four feet high, to allow a freight car of defendant, moving at from six to eight miles an hour, "kicked" down the track, without light or flagman, on a dark evening, and with a swinging side door open about nine inches, to pass, was struck by the door and killed. It was at an open space covered with tracks, which many people, to defendant's knowledge, used as a thoroughfare at that hour. Held, that there was sufficient evidence to justify the jury in finding that defendant was grossly negligent.—CHICAGO & A. R. CO. v. O'NEIL, Ill., 50 N. E. Rep. 216.

89. RAILROAD COMPANY — Negligence.—Complaint cannot be made of refusal of an instruction, one more

favorable to the party asking it, and sufficiently stating the law sought to be presented thereby, being given. Judgment against a railroad for the killing of stock on the track cannot stand, in the absence of evidence of negligence, where it is shown that the road was properly fenced; Act April, 1893, which makes the killing *prima facie* evidence of negligence, providing that proof that the road is inclosed with good and lawful fence is a defense, putting the burden on plaintiff of showing negligence of the railroad.—ATCHISON, ETC. RY. CO. v. CAHILL, Colo., 52 Pac. Rep. 1111.

90. RAILROAD COMPANY—Negligence—Injury at Crossing.—Where plaintiff was injured at a railway crossing, by a train which was running at a rate of speed prohibited by ordinance, while such excessive speed would not relieve him from the necessity of observing ordinary care, if it misled him or deprived defendant of its last chance to avoid the accident, it may properly go to the jury on both the issues of negligence and contributory negligence.—NORTON v. NORTH CAROLINA R. CO., N. Car., 29 S. E. Rep. 886.

91. RAILROAD COMPANY—Street Railroads—Injury to Passenger.—Street railways are common carriers of passengers, and as such are required to exercise the utmost skill, diligence and foresight, consistent with the business in which they are engaged, for the safety of their patrons; and they are liable for the slightest negligence.—LINCOLN ST. RY. CO. v. MCCLELLAN, Neb., 74 N. W. Rep. 1074.

92. REMOVAL OF CAUSES—Federal Question.—Where the plaintiff's pleading shows that certain acts were done in violation of the constitution and laws of Texas, but does not show that the suit was one arising under the constitution or laws of the United States, a petition for removal is properly denied, since no federal question appears on the face of plaintiff's statement of his case.—GALVESTON, H. & S. A. RY. CO. v. STATE OF TEXAS, U. S. S. C., 18 S. C. Rep. 603.

93. REPLEVIN—Pleading and Proof.—A plaintiff in replevin, who pleads only a special ownership, must prove such title as he pleads it, and cannot recover on proof of general ownership.—SUCKSTORF v. BUTTERFIELD, Neb., 74 N. W. Rep. 1076.

94. RES JUDICATA.—The court, in the first suit, decided, as to plaintiff's demand, that he (plaintiff) had no cause of action to compel the defendant to sign a contract of lease and rent notes. This ruling did not conclude the plaintiff from prosecuting suit for any right not necessarily covered by the ruling.—LAROUSSINI v. WERLEIN, La., 23 South. Rep. 467.

95. SALE—Breach—Performance.—An allegation of a tender of hops of an average of the best product of a crop produced upon certain premises, and that defendants exerted their utmost to produce a crop "of choice quality, in sound condition, of good color and fully matured," does not show a compliance with a contract to deliver, absolutely, hops of that quality and condition, to be produced upon said premises.—LILIENTHAL v. MCCORMICK, U. S. C. C., D. (Oreg.), 86 Fed. Rep. 100.

96. SALE—Conditional Sale—Performance.—The contract between the parties set out in the opinion construed, and held not one of absolute sale of property accompanied by the warranty of the vendor as to the qualities of the property, but one of conditional sale; the qualities of the property being of the essence of the contract, and the establishment of their existence a condition precedent to the completion of the sale.—CHARTER GAS ENGINE CO. v. COLERIDGE STATE BANK, Neb., 74 N. W. Rep. 1070.

97. SLANDER—Repetition of Actionable Words.—An admission by defendant, at plaintiff's request, and in the presence of a third party, that on a previous occasion he had used the alleged slanderous words, is no ground of action, when it does not appear that the language was originally used in the presence of a third party.—O'DONNELL v. NEE, U. S. C. C., D. (Mass.), 86 Fed. Rep. 96.

98. TAX SALES—Conclusiveness—Estoppel.—Tax sales, based on assessments against the recorded owner holding under titles conveying ownership, bind all previous owners by whose acts or acquiescence such titles are placed on the public records, and thus become guides for the assessors.—REINACH v. NEW ORLEANS IMP. CO., La., 23 South. Rep. 455.

99. TAXATION—Brokers—Municipal Corporations.—A person who, for a commission, negotiates purchases and sales of stocks, bonds or securities on behalf of clients, either in his own or the principal's name, and receives same, and delivers possession and executes transfers thereof, is a broker within an ordinance imposing a license tax on such.—BANTA v. CITY OF CHICAGO, Ill., 50 N. E. Rep. 233.

100. TAXATION—Exemption.—Outlying land belonging to a sanitary district, which can be used only for drainage by the inhabitants of the district, is not exempt from taxation, under Rev. St. 1893, ch. 120, § 2, subd. 9, providing that "all market houses, public squares or other public grounds, used exclusively for public purposes," are exempt.—SANITARY DIST. OF CHICAGO v. MARTIN, Ill., 50 N. E. Rep. 201.

101. TAXATION—Property Subject to Taxation.—A tax assessed against money in possession of the liquidators of an insolvent bank is neither illegal nor unconstitutional, as it comes within the designation of both the constitution and revenue law as property which is subject to taxation.—STATE v. BANK OF COMMERCE, La., 23 South. Rep. 464.

102. TAXATION—Subrogation.—Where a private tax sale of real estate is invalid because of the failure of the county treasurer to first make such return, the purchaser thereat is subrogated to the rights which the public had against such real estate, and entitled to enforce a lien against the same for the taxes paid at the sale, and for all prior and subsequent taxes existing against the real estate and paid by him because of such purchase.—JOHNSON v. FINLEY, Neb., 74 N. W. Rep. 1080.

103. TELEPHONE COMPANIES — Constructing Lines—Ordinances.—The authority retained by a city to regulate the manner of occupation of its streets by a telephone company includes the power to compel adoption from time to time of all reasonable and generally accepted improvements which tend to decrease the obstruction of the streets, or increase the safety or convenience of the public.—COMMONWEALTH v. WARWICK, Penn., 40 Atl. Rep. 93.

104. TENDER—Conditions—Interest.—Where a decree was rendered directing complainant to pay to defendant or to the registry of the court, a certain sum, and defendant, on such payment, to deliver to complainant, or into the registry of the court, certain stock, from which decree defendant appealed to the supreme court, held, that a tender to defendant's solicitor of the amount of the decree, with interest, coupled with a demand for the immediate surrender of the stock, and involving a settlement of the pending appeal, was bad, as a conditional tender, and did not stop the running of interest. This would be so although nothing was said respecting the dismissal of the appeal, if the effect of acceptance of the tender would be to prejudice the prosecution of the appeal.—BEARDSLEY v. BEARDSLEY, U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 16.

105. TOWNS—Power to Borrow Money—Debts.—To render a town liable to repay money borrowed and expended for it, by any town officer or agent, the town must have previously authorized or subsequently ratified such borrowing by vote in legal town meeting upon a sufficient article in the warrant.—LOVEJOY v. INHABITANTS OF FOXCRAFT, Me., 40 Atl. Rep. 141.

106. TRIAL—Evidence—Exclusion From Jury.—Where the court, on the introduction of evidence, informed counsel that it was improper, and would probably be excluded from the jury, it was not error for the court *sua sponte* to withdraw the testimony from the jury at the close of the trial.—FIRST NAT. BANK OF PORTLAND v. HOME INS. CO., Oreg., 52 Pac. Rep. 1055.

107. TROVER—Damages.— The measure of damages, ordinarily, in an action of trover, is the value of the property at the time of conversion, with interest from the time when the cause of action accrues.—WING v. MELLIKEN, Me., 40 Atl. Rep. 138.

108. TRUSTS—Direction to Pay Debt.—The direction of R to O, and the agreement of O with R, to pay to certain creditors of R money owing by O to R, does not create a trust in favor of such creditors, or amount to an equitable assignment to them; but an acceptance by such creditors is necessary, and this will make O their debtor, but, before such acceptance, other creditors of R can reach the fund by garnishment.—COMMERCIAL NAT. BANK v. KIRKWOOD, Ill., 50 N. E. Rep. 219.

109. TRUSTS—Resulting Trust—Evidence.—Where the question was whether a grantee had paid the price, as a loan, for another, and had agreed to convey to the latter on repayment, the grantee claimed that he purchased, and leased to the other party. The latter testified that it was a loan, and that when the deed was made the grantee, on being requested to make a contract to convey, said the matter could be attended to some other time. This remark was corroborated by another party present. Witnesses testified to a statement of the grantee, before the deed was made, that he would convey to the other party, and statements afterwards made showing that he recognized the latter as equitable owner. Held, to justify a finding that the transaction was a loan, thus creating a resulting trust in favor of the borrower by way of mortgage.—SCOTT v. BEACH, Ill., 50 N. E. Rep. 196.

110. TRUSTS — Resulting Trust — Insurance by Life Tenant. — A life tenant insured his interest for an amount equal to the value of the fee, without any intention of providing protection for his remainder-man, and paid the premiums. Held, that no trust resulted, either in the whole amount or in the excess of the value of the life estate, for the remainder-man's benefit.—SPALDING v. MILLER, Ky., 45 S. W. Rep. 462.

111. TRUST DEED FOR CREDITORS—Fraudulent Condition.—A deed of trust for creditors, not under the general assignment law, conveying goods worth $1,200, to be used, first, in satisfying claims in class A, amounting to $800, and then to satisfy *pro rata* the claims in class B, amounting to $1,250, is fraudulent, because of the condition that only those in class B who should release their claims in full should receive anything under the deed.—TEMPLE GROCER CO. v. CLABAUGH, Tex., 45 S. W. Rep. 482.

112. USURY—National Banks.—A statutory enactment which provides by whom, and under what procedure, a penalty, previously created, may be recovered, is not a penal statute, and there exists no reason for a requirement that it be strictly construed.—ALBION NAT. BANK v. MONTGOMERY, Neb., 74 N. W. Rep. 1102.

113. VENDOR AND PURCHASER—Assumption of Debt.—When a grantee in a deed conveying lands on which there is a mortgage assumes the debt as a part of the consideration, he thereby becomes personally liable to the mortgagee, and may be sued by him, or be held responsible for any deficiency on foreclosure.—INGRAM v. INGRAM, Ill., 50 N. E. Rep. 198.

114. VENDOR AND PURCHASER—Bond for Deed—Foreclosure.—In an action by a vendor to have an equitable interest of the vendee barred and foreclosed, a failure on the vendor's part to tender performance is no defense.—SECURITY SAVINGS & TRUST CO. v. MACKENZIE, Oreg., 52 Pac. Rep. 1046.

115. VENDOR AND PURCHASER — Mortgages — Agreement to Pay.—The agreement of the grantee of one of two lots owned by the grantor, subject to a mortgage, to assume and pay it as part of the purchase price, inures to the benefit of the subsequent grantee of the other lot, in case the mortgage is not paid, and the second lot is sold to satisfy it.—COOLEY v. MURRAY, Colo., 52 Pac. Rep. 1108.

116. VENDOR AND PURCHASER—Specific Performance —Contract.—The terms of a sale of realty agreed on between a vendor and purchaser were embodied in a written agreement, executed by the vendor, and left with the purchaser with the understanding that it should be signed by him also. It was not signed, but was accepted and placed on record by the purchaser. Held, that his omission to sign the same, whether by inadvertence or otherwise, did not relieve him from liability under the agreement.—MCPHERSON v. FARGO, S. Dak., 74 N. W. Rep. 1057.

117. WATERS—Obstruction—Nuisance. — The grantee of an original creator of a nuisance is liable for continuing the same after notice and demand for its removal.—TOWNES v. CITY COUNCIL OF AUGUSTA, S. Car., 29 S. E. Rep. 851.

118. WATER RIGHTS—Prior Appropriation.—Plaintiff sought an injunction to prohibit defendant from interfering with a water ditch the water of which he had used for five years. Defendant offered to show that, by artificial canals and the natural channel of a creek, he had used the water, about which plaintiff complained, for 18 years prior to the commencement of the suit. Held, that the testimony should have been admitted.—KLEYENSTUBER v. ROBINSON, Ariz., 52 Pac. Rep. 1117.

119. WILLS—Construction—Conditions. — A will provided a guardian for a minor son, to whom land was devised on the condition that, if he should die without issue, the income should go to testator's wife during her life or widowhood, and, in the event of her marriage or death, the land should go to another son. Held, that the time when the conditions should happen was not limited to testator's death, in view of Code, § 1327, providing that a contingent limitation depending on the dying of any person without issue takes effect when such person shall die not having such issue, unless the will declares otherwise; and hence, after testator's death, and before the minor son has a child, and after the decease of the other son, the widow remaining unmarried has a contingent estate in the land.—KORNEGAY v. MORRIS, N. Car., 29 S. E. Rep. 875.

120. WILLS—Equity Jurisdiction.—Where a will provides for the sale of real property by the executor, and the distribution of the proceeds in a mode prescribed, a trust is thereby created; and hence equity has jurisdiction of a bill by a *cestui que trust* to construe the will, and to enforce the trust as therein provided.—MINKLER v. SIMONS, Ill., 50 N. E. Rep. 176.

121. WILLS—Nature of Estate.—Where testator gives all his property, real and personal, to his wife for life, or so long as she remains his widow, she takes no part of it absolutely, except under the intestate laws, though there is no interposition of a trustee, and the gift over, on her death or marriage, of a part of the property, to a charity, fails because of testator's death within 30 days after execution of will.—IN RE KANE'S ESTATE, Penn., 40 Atl. Rep. 90.

122. WILLS—Powers and Execution Thereof.—When, by a will, a power of sale is given to executors, to be exercised with the consent of the widow, signified by her joining in and becoming a party to the deed, the exercise of the power is dependent upon the joining by the widow in a deed as prescribed by the testator, and, on her death without having consented in the mode prescribed, the power is gone.—PIERSOL v. ROOP, N. J., 40 Atl. Rep. 124.

123. WILLS—Trusts—Equity.—A will devised and bequeathed certain shares to testator's children, with the condition that each was to own one-half his share absolutely, and to have a life estate in the other half, with remainder to the heirs of testator's body, and that improved real estate should constitute the entailed half. Held, that in the absence of a showing that more than half of all said shares was personalty, the will did not create a mixed trust of real and personal estate, so as to enable any of the children to sue in equity to have the will construed.—HARRISON v. OWSLEY, Ill., 50 N. E. Rep. 227.